ISSUES

- Whether claimant has proven by a preponderance of the evidence that the proposed RT300-S system represents reasonable medical treatment necessary to maintain claimant at maximum medical improvement ("MMI") subject to an award as maintenance medical treatment?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on June 13, 1997 when she was involved in a hit and run motor vehicle accident while employed with employer. As a result of the injury, claimant was rendered an incomplete tetraplegic. Claimant testified at hearing that she has use of both arms, one hand, some use of her right leg and no use of her left leg.

2. Claimant lives in Montrose, Colorado. Claimant has undergone extensive rehabilitation as a result of her injury through Craig Hospital in Englewood, Colorado. On June 24, 2014, claimant returned to Craig Hospital for outpatient physical therapy. The physical therapist noted that claimant had ordered and received an Easy Stand at her last re-evaluation, but had not been using it. The therapist noted that the benefits of standing were reviewed with claimant and she recommended claimant start standing regularly.

3. Claimant testified at hearing that during her June 2014 occupational therapy with Craig Hospital, she used a RT300-S FES-CE system bike that helps claimant build up muscle mass. Claimant testified she used the bike one time during this visit. Claimant testified she believes the bike will help her use her right leg more and could help claimant with her muscle spasms.

4. Claimant's nurse practitioner, Ms. Preston, issued a letter dated June 27, 2014 requesting claimant be provided with the FES-CE system. Ms. Preston noted in the letter that the FDA had cleared the product for different treatment including relaxation of muscle spasms, prevention or retardation of disuse atrophy of lower extremity musculature, increasing local blood circulation, and maintaining or increasing range of motion. Ms. Preston indicated that claimant had been evaluated for prescription use of the RT300-S system by the SCI clinical team under her supervision at Craig Hospital and indicted that the program is medically indicated for claimant and there were no contraindications for the use of FES-CE.

5. Claimant testified at hearing that due to her location in Montrose, Colorado, she cannot reasonably travel to Craig Hospital in Englewood, Colorado to use the RT300-S system on a regular basis. Therefore, claimant requests that she be

provided with her own system. The ALJ notes that the distance claimant would need to travel from Montrose, Colorado to Craig Hospital would involve over five hours of travel time each way. The ALJ finds that the concern expressed by Ms. Preston involving disuse atrophy and relaxation of muscle spasms represents reasonable concerns regarding claimant's condition as a result of the June 13, 1997 work injury and finds that the recommendations for use of the RT300-S system to be reasonable to protect against this deterioration.

6. Respondents obtained a physician advisor report dated September 15, 2014 from Dr. Lewis. Dr. Lewis noted that Colorado guidelines do not address the issue of the RT300-S FES-CE system. Dr. Lewis noted that Aetna would consider the device only after certain criteria were met, including completion of a training program consisting of 32 physical therapy sessions over a 3 month period. Dr. Lewis also noted that Cigna did not consider the FES-CE system to be appropriate medical treatment as it was still experimental and investigational. Dr. Lewis recommended non-certification.

7. The ALJ credits claimant's testimony and determines that the RT300-S system is reasonable medical treatment necessary to maintain claimant at MMI. The ALJ finds claimant's testimony regarding the benefits of the use of the RT300-S system as persuasive regarding this issue. The ALJ finds the testimony of claimant along with the recommendations of Ms. Preston as more credible and persuasive than the contrary opinions expressed in the report of Dr. Lewis on this issue.

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 her 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 use of the RT-300S system will help prevent the further deterioration of her physical condition. As found, claimant has proven by a preponderance of the evidence that the use of the RT-300S system at her home is reasonable maintenance medical treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the RT-300S system recommended by Ms. Preston pursuant to the Colorado Medical Fee Schedule.

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

DATED: September 11, 2015

Keith E. Mottram

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that the medication Subsys prescribed by Dr. Jeffrey Kesten is reasonable, necessary, and related to her January 22, 1999 work injury.

FINDINGS OF FACT

1. Claimant worked for Employer performing ski-lift maintenance and dispatching duties from approximately 1983 to 2001.

2. On January 19, 1988 Claimant suffered a work related injury to her low back at the L5-S1 region while shoveling snow.

3. On February 24, 1993 Claimant suffered another work related injury while working for Employer due to a slip and fall that was noted to exacerbate her back symptoms.

4. On April 22, 1994 Claimant underwent an Independent Medical Examination (IME) performed by John Hughes, M.D. He noted that Claimant had a history of thoracic pain consistent with reactive thoracic spine facet joint syndrome and opined that was commonly seen post lumbar spondylosis. He opined that treatment would fall under palliative care provisions in the low back pain guides. *See* Exhibit B.

5. On March 15, 1995 Claimant was evaluated by Fred Teal, M.D. He noted that Claimant had upper back pain localized to the T6-7 area at the bra strap line and that the pain was associated with paravertebral muscles in this area. He noted the upper back pain was not associated with any specific event, but developed during the course of Claimant's recovery from her lumbar disc surgery. *See* Exhibit B.

6. On December 7, 1995 Claimant was evaluated by Scott Primack, M.D. Dr. Primack noted Claimant's ongoing mid back pains and that she still had discomfort in her thoracolumbar spine region. *See* Exhibit B.

7. On September 22, 1998 Claimant was evaluated by her personal care physician Dr. Arnold. Dr. Arnold recommended that Claimant's prior workers' compensation case be reopened because of her recurrent upper back pain. Dr. Arnold noted that Claimant was concerned that she never really received much evaluation of her upper back. *See* Exhibit B.

8. On January 22, 1999, Dr. Hughes performed a follow up IME. Dr. Hughes noted that he had initially evaluated Claimant on April 22, of 1994 following her February 1993 slip and fall injury. He noted that in April of 1994 Claimant had symptoms consistent with lumbar spondylosis and post disk herniation at L5-S1 necessitating a laminectomy. Dr. Hughes noted that in April of 1994 Claimant also had mild persistent S1 radiculopathy as well as reactive thoracic facet joint syndrome and that her primary concern in April of 1994 was her mid back pain. *See* Exhibit A.

9. Dr. Hughes noted that Claimant had received manual therapy and treatment for her mid back pain in the T6-T7 area and had done well from 1994 until September 22, 1998 when her mid back tightness and pain had returned. Dr. Hughes noted that Claimant was quite active in the winter, handling snowmobiles and climbing around on uneven and slippery surfaces in the course of her work in lift maintenance. At the IME Dr. Hughes noted that Claimant had two recent periods of increased mid back symptoms in September and December. *See* Exhibit A.

10. At the IME, Dr. Hughes opined that Claimant's lumbar spine condition was now stable and that there was no evidence of lumbar radiculitis or radiculopathy. Dr. Hughes opined with respect to Claimant's mid-back pain that it had gotten worse. Dr. Hughes noted that the worsening of Claimant's mid-back pain could be arguably a new injury due to her ongoing work activities. Under his recommendations, Dr. Hughes listed: consider substantial aggravation of long-standing mid-back pain to have occurred most recently during December of 1998. *See* Exhibit A.

11. On February 8, 1999 Claimant filed a Petition to Reopen her February 24, 1993 claim based on a change in physical condition and attached the IME report of Dr. Hughes as support. *See* Exhibit A.

12. On March 16, 1999 Respondents filed a General Admission of Liability (GAL) listing an injury date of January 22, 1999 (the date of Dr. Hughes' IME report) and admitting liability for medical benefits. Respondents noted on the GAL that they were not voluntarily reopening Claimant's 1993 injury in workers' compensation case number 4-292-984, but were admitting liability for a new January 22, 1999 date of injury. *See* Exhibit A.

13. Under the GAL Claimant has received significant treatment aimed at her thoracic spine.

14. On August 18, 2000 Pamela Knight, M.D. performed an impairment rating of Claimant's thoracic spine and placed Claimant at maximum medical improvement. Dr. Knight opined that Claimant would most likely need intermittent medical care over the next 5-10 years and would most likely require medications, and even possibly thoracic epidural injections. Dr. Knight noted that they would try to avoid surgery, if possible. *See* Exhibit A.

15. Claimant's MMI status was eventually withdrawn and Claimant continued to receive treatment aimed at her thoracic spine. Claimant underwent surgery including a thoracic spine fusion at T8-T11, thoracic fusion hardware removal, and thoracic spine stimulator implant. Despite these surgeries and significant treatment, Claimant continues to suffer from constant pain in her thoracic spine.

16. On January 9, 2008 it was noted by Dr. Piccone that Claimant had a lot of pain and discomfort and that she had very obvious muscle spasm upon examination. On May 27, 2008 Dr. Barolat opined that Claimant was suffering from a chronic severe thoracic neuritis and that she had persistent neuropathic pain which also caused her severe muscle spasm. On May 5, 2010 Dr. Barolat evaluated Claimant following the implantation of three externalized thoracic peripheral nerve stimulator electrodes and noted that Claimant was continuing to have muscle spasm despite the use of the peripheral stimulator device. *See* Exhibit B.

17. Claimant takes significant amounts medications currently in an attempt to cure and relieve her thoracic spine pain that she first experienced following her 1993 work injury, that got worse in late 1998, and that she has had significant surgical and non surgical treatment for.

18. Claimant is currently using a narcotic pain patch, Fentanyl, which delivers opioid narcotics to her via patch constantly. Claimant also uses Oxycodone in pill form for breakthrough pain.

19. Claimant's constant pain is 4-5 out of 10 when she is on medications, and 10 out of 10 when she is un-medicated. Claimant experiences muscle spasms in the thoracic region several times per day, which is described as breakthrough pain.

20. When Claimant experiences breakthrough pain due to muscle spasms in the thoracic region, her pain increases in intensity. Claimant often vomits, urinates, and defecates during these periods of muscle spasms. Claimant has resorted to wearing adult diapers. The episodes of breakthrough pain significantly limit Claimant's ability to function.

21. During the breakthrough pain, Claimant takes Oxycodone in pill form. Claimant often vomits the pill up. The Oxycodone takes approximately 25 to 30 minutes to kick in before Claimant experiences relief.

22. Claimant has been treating with Jeffrey Kesten, M.D. since 2009 for her persistent thoracic pain. Dr. Kesten is board certified in physical medicine and rehabilitation, pain medicine, and addiction medicine. In 2014 Dr. Kesten prescribed Claimant Subsys to better address Claimant's breakthrough pain and thoracic spasms. The request for Subsys was denied by Insurer. Despite the denial, Claimant was able to use Subsys via vouchers for approximately three months out of the last year in place of Oxycodone for her breakthrough pain.

23. During the period of time that Claimant used Subsys, it was used in place of Oxycodone. The Subsys Claimant used was sprayed into her mouth and it provided Claimant instant pain relief. Claimant had no trouble with vomiting the spray. Claimant was able to live a more normal life and have less worry about being incapacitated due to intense breakthrough pain while using Subsys.

24. Due to the increased instant relief and easier use of the Subsys and because of Insurer's denial, Claimant seeks an order finding that Subsys is reasonable and necessary to cure and relieve the effects of her admitted industrial injury and seeks to replace Oxycodone with Subsys for her breakthrough pain.

25. The issue at hearing was limited to whether Subsys is reasonable and necessary to cure and relieve the effects of Claimant's admitted industrial injury. The broader question of whether Claimant suffered a compensable injury and/or whether Claimant should be weaned completely from all narcotic medications was not before the ALJ. Respondents did not seek to withdraw the GAL.

26. Dating back to the early 1990's, Claimant has had ongoing psychological issues for which she has received treatment.

27. On June 6, 2012 Claimant underwent a psychiatric IME performed by Robert Kleinman, M.D. Dr. Kleinman diagnosed pain disorder that was associated with psychological factors and associated with a medical condition. He also diagnosed major depressive disorder. Dr. Kleinman opined that Claimant was using too high a dose of breakthrough medication and that the combination of narcotics and muscle relaxants was interfering with her ability to think clearly. Dr. Kleinman opined that Claimant's pain medication and muscle relaxants should be reconsidered. *See* Exhibit B.

28. On July 27, 2013 Steven Dworetsky, M.D. wrote a letter that opined that Claimant developed a major depressive disorder due to her chronic pain, physical limitations, and chronic pain medication. *See* Exhibit 4.

29. On December 11, 2013 Gary Gutterman, M.D. performed a psychiatric consultation for an IME. Dr. Gutterman opined that Claimant has experienced a major depressive disorder as well as a pain disorder associated with psychological factors and a medical condition. Dr. Gutterman believed there were a number of factors, including pain, contributing to her major depressive disorder. He opined that Claimant's pain complaints were enhanced by underlying unconscious psychological factors. He opined that her pain appeared both physiologic and non physiologic and that being unable to be active and athletic had contributed to her depression. Dr. Gutterman noted that Claimant clearly had several surgeries certainly contributing to her pain complaints but that underlying psychological factors and vulnerabilities contributed to her pain complaints and led to non physiological findings. He highly recommended titrating Claimant off narcotics and a referral to a physician specializing in detoxification. He opined that continuing on narcotics probably had both a harmful effect from a cognitive

and psychological perspective since narcotics can impact and impair cognitive function, alter mood, and add to depression. *See* Exhibit 3.

30. On June 24, 2014 Lawrence Lesnack, D.O. performed an IME. Dr. Lesnack opined that Claimant was extremely emotionally labile during the evaluation. He noted her subjective complaints of mid thoracic spine pain and severe muscle spasms. Dr. Lesnack opined that Claimant exhibited numerous pain behaviors and non-physiologic findings during evaluation and noted that despite the significant treatment received over the past 20 plus years, Claimant has not received any relief of symptoms or improvement in function. *See* Exhibit B.

31. Dr. Lesnack noted that treatments were based solely on Claimant's subjective complaints without correlating objective findings and that it was not surprising that her symptoms and functional status had not improved. Dr. Lesnack noted that given the lack of objective findings to explain Claimant's ongoing and progressive chronic pain complaints that she is not a candidate for the ongoing use of opioid pain medications and that she should be weaned from her current opioid pain medications. Dr. Lesnack opined that Claimant's chronic complaints of muscle spasms most likely stemmed from a psychologic standpoint rather than from any type of anatomic or physiologic standpoint. He recommended weaning from all controlled substance medications over the next several months in an inpatient detoxification program under the close supervision of a psychiatrist. *See* Exhibit B.

32. On February 17, 2015 Dr. Kesten performed a follow up medical evaluation. Dr. Kesten noted that Claimant had markedly improved symptom management when consuming Subsys as compared to Oxycodone. He noted Claimant would be undergoing a hearing regarding authorization for Subsys. *See* Exhibit 1.

33. On March 9, 2015 Dr. Lesnack authored an IME addendum. Dr. Lesnack noted that following the IME he performed in June of 2014, Dr. Kesten recommended that Claimant discontinue Oxycodone 5-10 mg four times per day as needed for breakthrough pain and instead recommended switching Claimant to Subsys 400 mcg up to four times per day as needed for breakthrough pain. *See* Exhibit B.

34. Dr. Lesnack noted that Subsys was intended to be used only in the care of cancer patients and by oncologists and pain specialists. He opined that since Claimant was not undergoing treatment for cancer pain the use of Subsys for breakthrough pain was not indicated. He continued to opine that Claimant should be weaned off all her current opioid pain medications in an inpatient detoxification program. He opined that the use of Subsys was not reasonable, necessary, or related to her occupational injury. *See* Exhibit B.

35. On March 17, 2015 Dr. Kesten performed a follow up medical evaluation. Dr. Kesten opined that Subsys was reasonable, medically necessary, and related to Claimant's work related injury. He noted that Dr. Lesnack believed the Subsys to be inappropriate as it was intended only in the care of cancer patients, but referred to off-

label prescribing as an ethical, legal, and common practice among physicians especially in pain management. Dr. Kesten noted that it is estimated that one in five prescriptions is off-label use and that an off label use may provide the best available intervention for a patient. Dr. Kesten noted that scientific and clinical considerations influenced his decision to prescribe Subsys to Claimant including the characteristics of Claimant's breakthrough pain, the pharmacokinetic profile of Subsys, and the failure of traditional short-acting opioids to effectively manage her breakthrough pain. He again requested that Subsys be authorized for Claimant's use. *See* Exhibit 1.

36. On March 31, 2015 Dr. Lesnack authored another IME addendum. He continued to opine that Claimant did not require the use of Subsys and that she should be weaned from all controlled substance medication. He recommended Dr. Kesten take into consideration the unreliability of Claimant's subjective complaints when recommending treatments. He noted in this case, the Claimant's significant psychiatric diagnosis/disorders may make her subjective complaints unreliable. *See* Exhibit B.

37. Dr. Kesten testified via deposition consistent with his reports and treatment records. Dr. Kesten opined that Subsys was the best medication to treat Claimant's symptoms and to optimize her functional status. He opined that he had exhausted all other options in regard to managing her debilitating muscle spasms and associated pain and that Subsys was distinctly the most superior pharmacologic choice.

38. Dr. Kesten noted that he implements the strictest and soundest of risk mitigation regarding substance abuse and was not concerned with Claimant. He opined that Claimant did not exhibit drug seeking behavior through the course of her treatment with him. He opined that Claimant's presentation was never suggestive of symptom magnification and her occasional demonstration of grimacing, groaning, and posturing were as a result of what he considered to be substantiated pathophysiology.

39. Dr. Kesten opined that Subsys takes effect more rapidly than any other option shy of intravenous use and due to the clinical presentation of Claimant's pain which spikes in a matter of minutes and becomes debilitating for her Subsys was by far the best choice with no other option available that would offer her the same benefit. Dr. Kesten opined that Oxycodone has a duration that is significantly longer than Subsys, and Oxycodone is at four to six hours which subjects Claimant to adverse side effects when she might not need that medication on board as long. He opined thus that Subsys had the pharmacokinetic profile with how her breakthrough pain presents that enabled getting the medication on board when she needs it and not to have it stay on board longer than she needs it. He noted that Claimant had the opportunity to trial Subsys and reported it to be the best analgesic option in managing her severe breakthrough pain. He agreed that Claimant was psychologically unstable, but disagreed with Dr. Lesnak's opinion that Claimant's symptoms were rooted almost entirely from a psychological standpoint. Rather, he opined emphatically that using Subsys would help Claimant with her physiologic chronic pain and would also mitigate some of her psychological symptoms as well. *See* Exhibit D.

40. Dr. Lesnak testified at hearing consistent with his IME reports. Dr. Lesnak opined that Claimant should be treated for depression and that opioids do not treat depression. He opined that Claimant should be weaned off all opioid medications slowly as inpatient detoxification. He opined that taking the amount of medications that Claimant has been taking over the years would cause her to have a decreased threshold for pain.

41. Dr. Lesnak opined that Claimant had functionally worsened despite significant treatment and medications. Dr. Lesnak opined that Claimant was taking a lot of medications that exceed recommended doses, including opioids. Dr. Lesnak noted that Subsys was an immediate short acting opioid and that Dr. Kesten had prescribed both Subsys and Oxycodone which also is a short acting medicine. Dr. Lesnak opined that you don't want to use two short acting and very potent opioids at the same time.

41. The opinion of Dr. Kesten is more credible and persuasive than the opinion of Dr. Lesnak. While Claimant also has psychiatric aspects to her pain, the opinion of Dr. Kesten that she suffers physiologic pain is credible and supported by the significant medical treatment records and the opinions of Dr. Gutterman, Dr. Piccone, and Dr. Barolat. The opinion of Dr. Lesnak that Claimant's pain is mostly psychological is not persuasive and it has been opined by many physicians that she has physiologic sources for her pain including thoracic muscle spasms which are the cause of her breakthrough pain.

42. Although Dr. Lesnak opined that Claimant should be weaned from all opioid medications, weaning cannot be performed immediately. Further, the issue of whether or not Fentanyl (long acting opioid patch Claimant uses) is reasonably necessary to cure and relieve the effects of Claimant's industrial injury was not at issue.

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. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes that Claimant has met her burden to show that Subsys is reasonable and necessary to cure and relieve the effects of her industrial injury. As found above, Claimant displayed thoracic symptoms shortly after her admitted 1993 industrial injury. Dr. Hughes noted in April of 1994 that Claimant had a history of thoracic pain consistent with reactive thoracic spine facet joint syndrome and opined that was commonly seen post lumbar spondylosis and that treatment would fall under care provisions in the low back pain guides. Claimant then suffered recurrent and worsening thoracic spine symptoms in late 1998. After a new IME was performed by Dr. Hughes in 1999, Respondents filed a new GAL with an injury date of January 22, 1999 (the date of Dr. Hughes' report) admitting for medical benefits. Dr. Hughes had noted in the 1999 IME that Claimant's symptoms were arguably a new injury but were recurrent. Following the GAL, Claimant underwent significant treatment aimed at her thoracic spine including fusion surgery and implantation of a spinal stimulator. Despite this significant treatment, she continues to be in constant pain. Claimant's has shown that her continued constant thoracic spine pain is causally related to her industrial injury.

Claimant also has met her burden to show she in fact suffers from physiologic pain and not just psychological pain. Although Respondents argue that Claimant's pain is entirely caused by her psychological issues and is not physiologic, this is not found

persuasive. Claimant has established that she suffers from physiologic pain as opined by Dr. Kesten, as noted in part by Dr. Gutterman, and as found through examination and notations of thoracic muscle spasms by Dr. Piccone and Dr. Barolat. Claimant has had multiple surgeries and treatment aimed at her thoracic spine. Although Claimant likely also has a psychological component to her continued pain symptoms, she has true physiologic pain and the opinion of Dr. Kesten is found persuasive.

Respondents also argue that Claimant should be weaned from all opioid medications. Although complete weaning may be an appropriate treatment plan to determine if it can alleviate Claimant's symptoms, it does not remedy Claimant's immediate problem with breakthrough pain. Claimant has established the most effective way to treat her breakthrough pain is through the use of Subsys in place of Oxycodone. She has established, more likely than not, that Subsys is both reasonable and necessary to treat her breakthrough pain. Subsys acts much more immediately than Oxycodone, does not stay in her system as long as Oxycodone, and is not thrown up by her like Oxycodone. Claimant has established that whether or not she weans from all opioid medications in the future Subsys is at this time reasonable and necessary to cure and relieve the effects of her industrial injury. Claimant's past use of Subsys allowed her to be more functional. Subsys does not stay in her system as long as Oxycodone which will also alleviate some of the problems with having Oxycodone on board constantly. It will deliver the opioids for her breakthrough pain more quickly allowing her more instant relief and the opinion of Dr. Kesten that it is the best option, short of IV for Claimant is found persuasive.

Although Respondents presented evidence that a total weaning from all opioids has been recommended by multiple physicians, the issue at hearing was limited to whether or not Subsys is reasonable and necessary to cure and relieve the effects of the industrial injury. The issue of weaning from all opioids, including Fentanyl patches, was not at issue. Making a determination that complete weaning from all opioid medicine is required would be outside the scope of issues identified by the parties for hearing. Here, the opinion of Dr. Kesten is credible and persuasive that Subsys is delivered more quickly, stays in the system for a shorter amount of time, and is a better option for Claimant than Oxycodone. The ALJ defers to his opinion as Claimant's treating provider that this is both a reasonable and necessary treatment option for Claimant. Dr. Kesten's opinions as a board certified physician in pain management, physical medicine and rehabilitation, and addiction medicine is found persuasive. His explanation for off-label use of Subsys as an appropriate usage in Claimant's specific case is found persuasive. Although Dr. Lesnak disagrees with the use of Subsys, the alternative would leave Claimant with the use of Oxycodone for breakthrough pain and Claimant has established that Oxycodone is not as effective in treating her breakthrough pain. As Subsys is the most effective way to treat her breakthrough pain, Claimant has established that it is both reasonable and necessary to cure and relieve the effects of her industrial injury.

ORDER

It is therefore ordered that:

1. Subsys is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury. Claimant shall be entitled to prescriptions for Subsys in place of Oxycodone.

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: September 15, 2015 /s/ Michelle E. Jones

_____

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his April 25, 2010 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant works as a Police Officer for Employer. On April 25, 2010 he suffered an admitted industrial injury in the form of a left lateral meniscus tear. Claimant jumped a fence while chasing a suspect. He heard a "pop" and experienced immediate, sharp pain in his left knee.

2. Claimant initially received medical treatment from Authorized Treating Physician (ATP) Cynthia Kuhn, M.D. He underwent a left knee MRI that revealed a left lateral meniscus tear and degenerative changes of the lateral compartment.

3. On April 30, 2010 Claimant visited Andrew W. Parker, M.D. at Orthopedic Associates, LLC for a surgical consultation. Dr. Parker noted that the MRI revealed "a displaced lateral meniscus bucket-handle type tear" as well as "significant lateral compartment" degenerative joint disease. He diagnosed Claimant with a "left knee displaced lateral meniscus tear" and left knee "lateral degenerative joint disease."

4. On May 13, 2010 Dr. Parker performed an arthroscopy and meniscectomy of Claimant's left knee. He observed "grade 4 changes throughout the entire weight-bearing surfaces of the lateral femoral condyle and lateral tibial plateau." Dr. Parker noted that the meniscus tear was "chronic in the sense that it was bulbous and non-repairable and appeared to be old."

5. During subsequent visits with Dr. Kuehn Claimant reported that, despite having some difficulty with lateral movement of the knees, "other activities such as jogging, walking, running or using the bike have been fine." On August 31, 2010 Dr. Kuehn determined that Claimant had reached Maximum Medical Improvement (MMI) with a 17% left lower extremity impairment rating.

6. Claimant subsequently reported lower back pain as the result of an altered gait from his left knee mensicectomy. He underwent physical therapy for his back condition and returned to Dr. Kuehn on January 10, 2011. Claimant mentioned that he had experienced increasing left knee pain over the weekend because of the cold weather.

7. More than three years passed without any medical records of reported left knee pain. However, on July 21, 2014 Claimant visited Dr. Kuehn for an examination of his left knee. Claimant explained that on July 12, 2014 he awoke with left knee pain and swelling. He remarked that on the prior day he had been out jogging in his spare time at home. Claimant did not mention any specific work-related incident but expressed concern that his symptoms might be related to his left knee compartment arthritis that had been diagnosed in 2010.

8. On July 21, 2014 Claimant underwent a left knee MRI. The MRI revealed mild patellofemoral and moderate lateral compartment degenerative changes. There were no left knee fractures or significant joint effusion.

9. On July 25, 2014 Claimant returned to Dr. Kuehn for an evaluation. Dr. Kuehn recounted that Claimant had undergone a left knee meniscectomy in 2010. The procedure provided good but not complete relief. Claimant had also been diagnosed with left lateral compartment arthritis in 2010. Dr. Kuehn remarked that Claimant had experienced intermittent left knee pain since reaching MMI but she attributed his symptoms to his underlying arthritis. She concluded that Claimant's left knee symptoms were not caused by work-related activities but instead constituted an exacerbation of his underlying arthritis.

10. On November 10, 2014 Claimant returned to Dr. Parker for an examination. Claimant reported that his surgery went relatively well, but his left knee was "never entirely normal." He explained that, although his left knee continued to bother him, the symptoms did not warrant additional treatment or intervention. Dr. Parker reviewed imaging studies from Claimant's personal medical provider Kaiser and noted that they revealed "bone on bone lateral compartment" degenerative changes. He thus diagnosed Claimant with left knee lateral compartment degenerative arthritis.

11. On December 23, 2014 Claimant underwent an independent medical examination with Lynn Parry, M.D. After reviewing Claimant's medical records subsequent to his April 25, 2010 industrial injury, Dr. Parry noted that he suffered from asymptomatic arthritis that became symptomatic as a result of his meniscus injury. She explained that Claimant's left knee meniscectomy predisposed him to more difficulties in managing his arthritis and "accelerat[ed] the development of intractable arthritis." Dr. Parry specified that Claimant's left knee injury and menisectomy caused him to suffer increased arthritis and symptoms. She summarized that Claimant's left knee symptoms were "clearly related" to his 2010 industrial injury. In a January 20, 2015 addendum Dr. Parry commented that Claimant's current left knee condition constitutes an aggravation of his April 25, 2010 industrial injury.

12. On February 11, 2015 Claimant filed a Petition to Reopen his April 25, 2010 claim. Respondents subsequently sought a medical records review with John T. McBride, Jr., M.D.

13. Dr. McBride performed an initial records review but issued an addendum report on June 26, 2015. He explained that in the initial review he lacked the original

MRI films of Claimant's left knee but had subsequently reviewed them. He commented that the April 29, 2010 MRI reflected moderate to severe osteoarthritis of Claimant's left knee lateral compartment. Dr. McBride specifically noted complete loss of the articular cartilage of the lateral compartment of the knee with cystic changes in the lateral femoral condyle and degenerative sclerotic changes in the tibial plateau. He also remarked that the significant erosion of the posterior of the lateral tibial plateau reflected a long-standing degenerative process.

14. Claimant testified at the hearing in this matter. He stated that his job as a Police Officer requires him to maintain a high level of physical fitness. Claimant explained that he jogged and played softball between January 2011 and July 2014 to remain physically active. He experienced minimal left knee discomfort but did not seek medical treatment. However, by July 12, 2014 his left knee symptoms worsened and he sought treatment with Dr. Kuehn.

15. Dr. Parry testified at the hearing in this matter. She maintained that Claimant had degenerative arthritis prior to his April 25, 2010 industrial left knee injury. Noting that the meniscus is a cushion that absorbs stress, Dr. Parry explained that the removal of the meniscus caused the rapid acceleration of Claimant's pre-existing left knee degenerative arthritis.

16. Dr. McBride testified at the hearing in this matter. He agreed with Dr. Parry that a meniscectomy can often cause or accelerate chronic osteoarthritis in the knee. However, he commented that mensicectomies are a risk factor for the onset or acceleration of degenerative osteoarthritis only in those cases where the meniscus had been performing a weight-bearing function prior to its removal. Dr. McBride explained that the function of the meniscus is to distribute the weight from the femur over the surface of the tibia. Removal of a functional meniscus will reduce the weight-bearing surface and cause the knee to concentrate the force from the femur to the tibia into a much smaller area. The additional force applied to a smaller area causes the cartilage to wear away more quickly on the weight-bearing surfaces. However, Dr. McBride explained that Claimant's left lateral meniscus was no longer performing its weight-bearing function prior to the meniscectomy. Therefore, removal of the meniscus on May 13, 2010 did not change the biomechanics of the lateral compartment of the left knee. Accordingly, there was no causal connection between Claimant's meniscectomy and the onset or acceleration of degenerative arthritis.

17. Dr. McBride also explained that there were no substantial differences between Claimant's 2014 MRI images and the 2010 images. He commented that the arthritic changes over the time period were no greater than those to be expected from the natural progression of the degenerative osteoarthritic process. The MRI's thus corroborate that the May 13, 2010 left knee menisectomy did not accelerate the degenerative process in Claimant's left knee.

18. Claimant has failed to establish that it is more probably true than not that his condition has worsened and he is entitled to benefits. As a result of Claimant's left lateral meniscus tear he underwent an arthroscopy and meniscectomy on May 13,

2010. He was also diagnosed with significant left, lateral degenerative joint disease. On August 31, 2010 he reached MMI for his left knee condition. More than three years passed without any medical records of reported left knee pain. However, on July 21, 2014 Claimant returned to ATP Dr. Kuehn for an examination of his left knee. Claimant explained that on July 12, 2014 he awoke with left knee pain and swelling because he had been out jogging on the day before. Dr. Kuehn determined that Claimant had experienced intermittent left knee pain since reaching MMI but she attributed his symptoms to his underlying arthritis. She concluded that Claimant's left knee symptoms were not caused by work-related activities but instead constituted an exacerbation of his underlying arthritis.

19. After conducting an independent medical examination Dr Parry explained that Claimant's left knee meniscectomy predisposed him to more difficulties in managing his arthritis and "accelerat[ed] the development of intractable arthritis." Dr. Parry specified that Claimant's left knee injury and menisectomy caused him to suffer increased arthritis and symptoms. She summarized that Claimant's left knee symptoms were "clearly related" to his 2010 industrial injury. In a January 20, 2015 addendum Dr. Parry commented that Claimant's current left knee condition constitutes an aggravation of his April 25, 2010 industrial injury. Dr. McBride agreed with Dr. Parry that a meniscectomy can often cause or accelerate chronic osteoarthritis in the knee. However, he commented that mensicectomies are a risk factor for the onset or acceleration of degenerative osteoarthritis only in those cases where the meniscus had been performing a weight-bearing function prior to its removal. Dr. McBride explained that Claimant's left lateral meniscus was no longer performing its weight-bearing function prior to the meniscectomy. Therefore, removal of the meniscus on May 13, 2010 did not change the biomechanics of the lateral compartment of the left knee. Accordingly, there was no causal connection between Claimant's meniscectomy and the onset or acceleration of degenerative arthritis. Based on the medical records, reports of Dr. Kuehn and persuasive testimony of Dr. McBride, Claimant has failed to demonstrate that he has suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to establish by a preponderance of the evidence that his condition has worsened and he is entitled to benefits. As a result of Claimant's left lateral meniscus tear he underwent an arthroscopy and meniscectomy on May 13, 2010. He was also diagnosed with significant left, lateral degenerative joint disease. On August 31, 2010 he reached MMI for his left knee condition. More than three years passed without any medical records of reported left knee pain. However, on July 21, 2014 Claimant returned to ATP Dr. Kuehn for an examination of his left knee. Claimant explained that on July 12, 2014 he awoke with left knee pain and swelling because he had been out jogging on the day before. Dr. Kuehn determined that Claimant had experienced intermittent left knee pain since reaching MMI but she attributed his symptoms to his underlying arthritis. She concluded that Claimant's left knee symptoms were not caused by work-related activities but instead constituted an exacerbation of his underlying arthritis.

6. As found, after conducting an independent medical examination Dr Parry explained that Claimant's left knee meniscectomy predisposed him to more difficulties in managing his arthritis and "accelerat[ed] the development of intractable arthritis." Dr. Parry specified that Claimant's left knee injury and menisectomy caused him to suffer increased arthritis and symptoms. She summarized that Claimant's left knee symptoms were "clearly related" to his 2010 industrial injury. In a January 20, 2015 addendum Dr. Parry commented that Claimant's current left knee condition constitutes an aggravation

of his April 25, 2010 industrial injury. Dr. McBride agreed with Dr. Parry that a meniscectomy can often cause or accelerate chronic osteoarthritis in the knee. However, he commented that mensicectomies are a risk factor for the onset or acceleration of degenerative osteoarthritis only in those cases where the meniscus had been performing a weight-bearing function prior to its removal. Dr. McBride explained that Claimant's left lateral meniscus was no longer performing its weight-bearing function prior to the meniscectomy. Therefore, removal of the meniscus on May 13, 2010 did not change the biomechanics of the lateral compartment of the left knee. Accordingly, there was no causal connection between Claimant's meniscectomy and the onset or acceleration of degenerative arthritis. Based on the medical records, reports of Dr. Kuehn and persuasive testimony of Dr. McBride, Claimant has failed to demonstrate that he has suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

ORDER

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

Claimant's request to reopen his April 25, 2010 Workers' Compensation claim is denied and dismissed.

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

DATED: September 16, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici

#J8G37N5S0D14BSv 2

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

ISSUES

1. Has the claimant proven by a preponderance of the evidence that she is entitled to housekeeping services?

2. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a walk-in tub?

3. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a walker?

4. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a sleep number mattress?

5. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a treadmill?

6. Has the claimant proven by a preponderance of the evidence that the respondents should pay for an Aqua Sport Spa?

PROCEDURAL MATTER

1. The parties filed Position Statements dated August 7, 2015. The claimant, in her Position Statement, attempted to argue that the respondents are liable for all medical services because of violations of Rule 16-10. The respondents objected to the claimant arguing this issue inasmuch as the respondents indicated that the claimant never identified a Rule 16-10 violation as an issue to be litigated at hearing in her Application for Hearing, in her discovery responses, and in counsel for the claimant's discussion of the issues prior to the taking of evidence.

2. The ALJ concludes that the issue of a violation of Rule 16-10 is not properly endorsed for hearing and was not litigated by consent; therefore, the ALJ makes no decision concerning that issue.

FINDINGS OF FACT

1. On December 10, 2009, the claimant sustained serious admitted work injuries when she was getting out of a car in the course and scope of her employment and slipped and fell on ice. The claimant's injuries included, but are not limited to low back, neck, leg, right arm and visual changes, particularly related to depth perception.

2. Prior to the December 10, 2009 industrial injury, on March 14, 2000, the claimant underwent an L3-4, L4-5, and L5-S1 decompression and bilateral L3-4, L4-5, and L5-S1 partial facetectomie, as well as foraminotomies with an L4-5 diskectomy and left posterior iliac crest bone graft with L4, L5, L5-S1 pedicle screw instrumentation with interbody fusion at L4-5 by Dr. Richard Lazar.

3. Subsequent to the December 10, 2009 industrial injury, on September 22, 2010, the claimant underwent an operative procedure which included removal of posterior pedicle screw instrumentation L4,-S1; exploration of fusion at L4-S1, revision decompression and medial facetectomies and foraminotomies L3-4, complete diskectomy and interbody fusion L3-4, placement of PEEK interbody spacer filled with bone marrow aspirate and demineralized bone paste L3-4, pedicle screw instrumentation L2-S1, posterolateral arthrodesis L2-S1 with local bone, bone marrow aspirate and demineralized bone paste.

4. On September 24, 2010, Dr. Lazar, as the authorized treating surgeon prescribed for the claimant a wheeled walker as part of the discharge orders from Penrose St. Francis Health Services for which he later provided a Certificate of Medical Necessity which the respondents failed or refused to provide and was therefore obtained by the claimant personally to assist the claimant in her activities of daily living following the multi-level back surgery.

5. On January 18, 2010, Suzanne Malis, M.D., the claimant's then authorized treating physician, prescribed for the claimant a TENS Unit which the respondents stipulated at hearing is currently authorized and not disputed as being reasonable, necessary and related to cure or relieve the claimant from the effects of the admitted work injury and based upon said stipulation is hereby ordered as approved.

6. Following the multiple surgeries performed by Dr. Lazar, a follow-up CT was performed which demonstrated on November 24, 2010: widespread degenerative changes throughout the visualized lower thoracic and lumbar spine; a lumbar levoscoliosis centered at approximately the L2-3 disc level. Note was made of posterior bulging of the annulus fibrosus with what appears to be a disc osteophyte complex

effacing the anterior thecal sac at the T12-L1 level primarily within a right paracentral distribution. Minimal posterior bulging of the annulus fibrosus at the L1-L2 disc level was also noted. At the L2-3 level, there was more broad-based bulging noted in the annulus fibrosus which mildly effaces the anterior thecal sac extending laterally both to the left and right. Mild effacement of the anterior thecal sac at the L3-4 disc level with a left paracentral distribution was also noted. A spacer was noted within the L3-4 disc space, as well as a spacer within the L4-5 intervertebral disc space. Small disc osteophyte complex was seen arising from the posterior aspect of the L4-5 disc level and the patient was noted to be status post L4 posterior laminectomy.

7. Further objective testing was performed by x-ray on January 9, 2013 which found postoperative decompression and fusion changes. Bilateral pedicle screws from L2-S1 were seen with vertical stabilizing rod fixation. The right-sided rod was noted not to reach the S1 pedicle screw. Anterior fusion cages at L4-5 and space material at L3-4 was again noted. Posterolateral intertransverse bone graft and laminectomy defects in the lower lumbar region were also present. Worsening spondylosis with developing bridging osteophyte at L1-2 above the fusion was identified and rotational S-shaped scoliosis is seen.

8. X-rays were also performed on January 8, 2014 which noted a levoconvex scoliosis centered at L1-2 with a mild increase in the acuteness of the angle at the level with bending to the right.

9. An MRI of the lumbar spine without contrast was performed on January 17, 2014. The findings included a levocurvature of the thoracolumbar spine. Although the MRI was not a dedicated scoliosis series, it was found that the levocurvature measured about 23 degrees. A 2 mm of retrolisthesis of L2 on L3 was unchanged. Posterior decompression laminectomy and posterior spinal fusion were seen from L2 through S1. A medial right upper renal pole cyst is also again seen, although not fully characterized on the exam. There was an increase in discogenic change at L1-L2, now with moderate edema, especially on the right side, and mild fatty endplate change on the left side. Scattered fatty discogenic changes at the other levels were again seen. There was an interbody bone graft at L4-L5 with questionable small strut of bony bridging anteriorly. L1-L2 noted an increase in right-lateralizing disc bulging which mildly narrows the right neural foramen and the canal is mildly narrowed on the right. The final impression included: Interval increase in disc bulging, endplate spurring and discogenic change at L1-L2, worse on the right with mild right neural foraminal and canal narrowing with a stable small right posterolateral disc herniation at T12-L1.

10. X-rays were again performed on September 10, 2014 which also found instrumented anterior and posterior fusion evident at L2-S1 post decompression, vertical stabilizing bar placement again seen which did not extend to the right S1 pedicle screw. No change was noted in the alignment with abrupt angulation at the L1-2 interval with asymmetric spondylosis and sclerosis at that level.

11. Additional MRI testing was performed on December 21, 2014 of the thoracic spine which found T7-T-8 moderate to large-sized left paracentral and axillary disc protrusion resulting in left ventral cord contouring. T8-T-9 mild to moderate sized right paracentral subligamentous disc protrusion which does not appear to contact the lower thoracic cord though it does result in right ventral cord contouring. T9-T-10 mild sized broad based right paracentral and axillary subligamentous disc protrusion; T-10-T11 mild-sized broad-based right paracentral subligamentous disc protrustion; T12-L1 moderate-sized right paracentral and axillary subligamentous disc protrusion partially effacing the right ventral subarachnoid space without definite nerve root impingement; subtle bandlike increased T2 and STIR signal seen centrally within the thoracic cord at T7 retrovertebral level extending distally which could represent an evolving syrinx secondary to the spondylotic changes.

12. Jack Rook M.D., the claimant's authorized treating physician, in conjunction with other authorized treating physicians, have prescribed a number of housekeeping/essential services and various medical devices needed by the claimant to cure and relieve her of her admitted injuries which appear from the objective testing to continue to be worsening with time. Dr. Rook testified credibly at hearing regarding the need for some of these services and assistive devices as found below.

13. On January 10, 2011, Dr. Rook first prescribed essential services for the claimant to include housekeeping services for 8 hours per week. By February 21, 2011, Dr. Rook increased the recommendation for said services to 15 hours per week. The claimant's significant other and mother, with whom she lived, provided said services for her during this time. On March 20, 2011, Dr. Rook provided a detailed letter in support of his prescription for said services in which he stated the claimant "continues to experience severe back pain and she is on high dose opioid analgesic therapy. She also has neurogenic pain involving her lower extremities. Objective supporting documentation would include the patient's surgical reports as well as the postoperative CT myelogram which was ordered by her surgeon. Because of her pain and the extent of her fusion, the patient is currently functioning in a sub-sedentary physical demand level. She is not able to manage her home…because of her clinical condition. Therefore, it is my opinion that essential services for housework…are medically necessary and related to her occupational injury claim." Dr. Rook agreed that having a

friend provide the services was reasonable if the friend charged a comparable rate to a cleaning service.

14. The claimant's authorized treating surgeon, Jeffrey Kleiner, M.D., recommended a walk-in tub on October 26, 2011. He noted the claimant being unable to care for herself hygienically because of difficulty with flexing her hips to step over the curb of the bathtub due to the severe back pain. Dr. Kleiner opined that due to the severe back pain associated with the pseudarthrosis which is a consequence of her work-related injury, the walk-in tub was reasonable to help with the claimant's hygiene and necessary since all other strategies for self-hygiene which have been tried have failed to assist her. On said date, Dr. Kleiner also provided a similar prescription for essential services as was provided by Dr. Rook, to include *inter alia* assistance with dishes, bathroom cleaning, window cleaning, vacuuming, sweeping, and mopping.

15. By December 5, 2011, again due to the continued deterioration of the claimant's medical condition, Dr. Rook recommended personal assistance services for the claimant recommending "two hours per day, seven days per week to assist her with cleaning (floors, windows, bathrooms, kitchen) vacuuming, doing dishes, laundry and shopping. He also opined the patient would now require additional assistance for lower extremity dressing, including shoes and socks, which she was unable to do herself. These services were again being provided by the claimant's mother and significant other. At that time, additional surgery was tentatively scheduled to be performed by Dr. Kleiner for treatment of the pseudoarthrosis which was anticipated to include removal of her hardware and refusion using a posterior approach.

16. While waiting for the surgery to be performed, the claimant's moist heating pad ceased operation and Dr. Rook provided a prescription for said device as being medically necessary and related to her occupational injury claim to cure and relieve the claimant of said injuries.

17. On February 7, 2014, Dr. Kleiner, again recommends essential services since the claimant was having difficulty by this point performing any of her own activities of daily living. He went on to recommend a custom cane so the height could be altered based upon her degree of lean caused by the work-related injuries.

18. Complications to the claimant's medical condition arose and surgery was postponed which additional consultations and pre-surgery testing were performed. Dr. Rook noted on March 27, 2014 that the claimant had gotten "very weak over the past few years due to inactivity related to her back pain." He provided a prescription for a treadmill to use to strengthen her legs and back in preparation for the upcoming surgery

and he considered this modality to be one which would also be helpful postoperatively. The claimant purchased the recommended treadmill on sale at a price of $1,449.99 plus tax. Dr. Rook provided further support of the purchase in his May 8, 2014 progress report in which he stated: "[t]he reasoning for the treadmill is to improve her endurance and lower extremity strength in preparation for surgery. I also believe that will help with her postoperative recovery, which likely will be prolonged given the number of years that have passed since her on-the-job injury in conjunction with the severity of her current clinical condition." He further stated: "I do believe the treadmill that I requested is medically necessary, reasonable, and related to her occupational injury claim."

19. On October 21, 2014, Dr. Rook again prescribed a new moist heating pad since her current unit was in disrepair and also opined that due to the discomfort she was having with sleeping she required an orthopedic mattress or adjustable bed.

20. Dr. Rook personally contacted the claimant's surgeon, Dr. Kleiner. Dr. Kleiner informed Dr. Rook that due to the claimant's progressive deteriorating posture and spinal alignment that he no longer was comfortable performing what originally was felt to be a simple repair of a pseudoarthrosis. Dr. Kleiner was recommending in December 2014, a more extensive surgical procedure to straighten out the claimant's spine and was recommending that she be evaluated by a spinal reconstruction surgeon. The claimant is unable to stand up straight by this point, leans towards her right and has kyphotic posturing.

21. On January 7, 2015, Dr. Rook again opines the medical necessity, reasonableness and relatedness of an adjustable bed given her spinal condition. Disc protrusions were now noted at C5-6 and C6-7 resulting in mild spinal stenosis and ventral cord flattening without code edema and at the C2-3 level changes resulting in right-sided neural foraminal narrowing which could affect the exiting right C3 nerve root were noted. Dr. Rook provided an updated prescription for essential services noting her need for assistance with activities of daily living including dressing, bathing, housework and transportation. Essential services were prescribed at four hours per day. On this date Dr. Rook also prescribed a wheeled walker to assist the claimant in her independent household and toileting activities.

22. On February 18, 2015, Dr. Rook again followed the claimant's medical progress and opined in his Outpatient Progress Note that the claimant again was provided a prescription for a moist heating pad and TENS Unit. The respondents have admitted pre-authorization for the TENS Unit and it is therefore herein ordered.

23. Steven J. Barrick, D.O. provided the claimant a prescription for an Aquafit Sport therapy tub on February 24, 2015. The therapy tub provides a slight current against which the claimant walks to strength her muscles in a manner which provides more buoyancy and accommodates the claimant's phobia of germs present in public water therapy locations.

24. The respondents obtained their first medical records review by Dr. Nicholas Olsen on July 26, 2011. An IME was performed by Dr. Olsen on August 24, 2011 when a second recommendation for denial of services and devices was made. The respondents' third medical records review was performed by Dr. Olsen on May 7, 2015 which is more specifically directed toward the recommendation made for a spinal cord stimulator, which is not the subject before this ALJ at this hearing.

25. Dr. Olsen opined on August 24, 2011 and again at hearing that the claimant "would not be precluded from participating in light household chores" but should require assistance with heavy household chores. His opinion was that the respondents should not be required to pay for such services for the claimant, however, because those services should be performed by other members of the household without compensation and therefore his opinion was that she was not in need of any essential services. He also opined similarly about all devices recommended by all treating providers and simply not being needed or medically necessary to treat the claimant's condition.

26. Dr. Olsen opined that the claimant requests for a treadmill, an orthopedic bed or a Sleep Number bed, an Aquafit Sport Therapy Spa, and a walk-in tub were not reasonable or necessary for the claimant's work-related condition. The ALJ finds these opinions of Dr. Olsen to be credible and persuasive.

27. The ALJ finds that the claimant has established that it is more likely than not that she requires essential services for activities of daily living as opined by Dr. Rook for four hours per day and seven days a week.

28. The ALJ finds that the claimant has established that it is more likely than not that she requires a moist heating pad as recommended by Dr. Rook.

29. The ALJ finds that the claimant has established that it is more likely than not that she requires a wheeled walker as recommended by Dr. Rook. Dr. Rook opined that the claimant presently can only shuffle her feet which the ALJ infers would indicate the need for a wheeled walker.

30. The ALJ finds that the claimant has failed to establish that it is more likely than not that she requires a treadmill. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of a treadmill.

31. The ALJ finds that, given the essential services ordered herein and the opinion of Dr. Olsen that the Guidelines do not support the prescription for a specialized bed, the claimant has failed to establish that it is more likely than not that she requires an orthopedic bed or a sleep number bed.

32. The ALJ finds that the claimant has failed to establish that it is more likely than not that she requires an Aquafit Sport Therapy Spa. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of a treadmill an Aquafit Sport Therapy Spa.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that she requires a walk-in tub. Given the essential services ordered herein, the ALJ infers that the claimant will have assistance into and out of the tub.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), supra, provides:

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

5. Respondents thus 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).

6. As hereby found based upon the evidence presented at hearing, the claimant showed it more probably true than not that the treatment recommended of essential services, a wheeled walker with brakes, and moist heating pads are reasonably necessary and casually related to the claimant's admitted industrial injury and are therefore the liability of the respondents.

7. The determination of whether a particular treatment is reasonable and necessary is a question of fact for the ALJ *City & County of Denver School Dist 1 v. ICAO,* 682 P.2d 513 (Colo. App. 1984) and the provision for payment of essential services is generally seen reasonable when the claimant requires *inter alia* assistance with medications, hygiene and nutrition. *Stormy Hebrew v. Dairy Queen,* W.C. 4-155-507 (Oct. 25, 2002).

8. As found, the claimant proved by a preponderance of the evidence that she required the assistance of others to provide the prescribed essential services. The claimant has also proved by a preponderance of the evidence that the reasonable value for the services provided those persons should be set by the fee schedule for such similar services.

9. The ALJ concludes that the respondents shall pay, at the fee schedule rate, for fours per day and seven days per week, beginning with the date of service of this order, for reasonably necessary medical benefits as sought by the claimant, including, all essential services recommended by the authorized treating physicians, wheeled walker with brakes, and most heating pads.

10. As found above the claimant has failed to establish by a preponderance of the evidence that the respondents are liable for the provision of a treadmill, an orthopedic bed or Sleep Number bed, an Aquafit Sport Therapy Spa, or a walk-in tub.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that she requires essential services for activities of daily living as opined by Dr. Rook for four hours per day and seven days a week.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that she requires a moist heating pad as recommended by Dr. Rook.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that she requires a wheeled walker as recommended by Dr. Rook. Dr. Rook opined that the claimant presently can only shuffle her feet which the ALJ infers would indicate the need for a wheeled walker.

14. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires a treadmill. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of a treadmill.

15. The ALJ concludes that, given the essential services ordered herein and the opinion of Dr. Olsen that the Guidelines do not support the prescription for a specialized bed, the claimant has failed to establish by a preponderance of the evidence that she requires an orthopedic bed or a sleep number bed.

16. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires an Aquafit Sport Therapy Spa. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of an Aquafit Sport Therapy Spa.

17. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires a walk-in tub. Given the essential services ordered herein, the ALJ infers that the claimant will have assistance into and out of the tub.

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay for essential services for the claimant at the fee schedule rate, for fours per day and seven days per week, beginning with the date of service of this order.

2. The respondent-insurer shall pay for the provision of a moist heating pad.

3. The respondent-insurer shall pay for the provision of a wheeled walker as recommended by Dr. Rook.

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

5. The claimant's request for an orthopedic bed or a Sleep Number Bed is denied and dismissed.

6. The claimant's request for an Aquafit Sport Therapy Spa is denied and dismissed.

7. The claimant's request for a walk-in tub is denied and dismissed.

8. 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: September 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 Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination physician that she reached maximum medical improvement as of February 2, 2011 and that she suffered no permanent impairment.

2. Determination of Claimant's average weekly wage.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from October 4, 2010 through October 7, 2010 and from October 21, 2010 through November 10, 2013.

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary partial disability benefits from November 11, 2013 through June 18, 2015.

5. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of continued medical maintenance benefits.

6. Whether Claimant has established by a preponderance of the evidence that the emergent treatment as well as the treatment provided by Dr. Chimonas, Dr. Martin, and PA Peterson was authorized.

FINDINGS OF FACT

1. Claimant worked for Employer as a customer care representative beginning in approximately 2001. Claimant's duties included handling inbound calls, taking customer payments over the telephone, and setting up payment plans/arrangements with customers. Claimant had a brief absence from employment in May of 2005 and returned to employment in March of 2006.

2. Due to her requirement of accessing customers' financial information, Claimant was subject to background checks every six months which she always passed.

3. On October 4, 2010 while so employed, Claimant slipped and fell on Employer's bathroom floor. Claimant landed on her back and did not lose consciousness.

4. An ambulance was called and Claimant was transported to the emergency room at North Colorado Medical Center. *See* Exhibit 4.

5. Claimant arrived at North Colorado Medical Center at approximately 3:18 p.m. She was evaluated and was diagnosed with closed head trauma status post fall. She was discharged at 5:09 p.m. and was to follow up with her primary care physician. *See* Exhibit 15.

6. Claimant did not work the following day due to her pain from the injury. On October 6, 2010 Claimant attempted to return to work but the pain was intolerable and she was referred to Employer's workers' compensation provider.

7. On October 6, 2010 Claimant was evaluated by Marc-Andre Chimonas, M.D. Claimant reported pain in the right side of her neck, center of her thoracic spine, and lumbar spine radiating to the flanks. Claimant reported losing her footing on a wet floor at work and falling backwards landing on her back and striking her head against the floor. Claimant reported that at the emergency department she had CT scans of her head and neck which were negative. Dr. Chimonas assessed her with concussion, cervical strain, thoracic strain, and strain of the lumbar region. Dr. Chimonas provided a work status of no work capacity. *See* Exhibit 16.

8. On October 7, 2010 Claimant was evaluated by Dr. Chimonas. Claimant reported improvement overnight, that her neck pain had improved slightly, and that her headaches were becoming less frequent. Claimant reported her primary complaint as back pain. Dr. Chimonas provided a work status of restricted duty with a maximum of 4 hour shifts and with a work space allowing standing or sitting and changing positions as Claimant felt necessary. *See* Exhibit 16.

9. On October 8, 2010 Claimant returned to work. Employer accommodated her work restrictions and she continued to work within her restrictions until October 21, 2010. Although she was working within her restrictions of 4 hour shifts, Claimant did not establish that she suffered any wage loss during this period of time.

10. On October 12, 2010 Claimant was evaluated by Dr. Chimonas. Claimant continued to report pain in her neck that was improving as well as pain in her back that she reported was getting worse. Dr. Chimonas provided a continued work status of restricted duty with maximum 4 hour shifts and with a work space allowing standing or sitting and changing positions as Claimant felt necessary. *See* Exhibit 16.

11. On October 21, 2010 Employer advised Claimant that they no longer had light duty work available for her and Claimant stopped working for Employer. Claimant did not work again for any employer until November of 2013. Claimant did not look for work during this period of time.

12. On November 9, 2010 Claimant was evaluated by Dr. Chimonas. Claimant reported that her headaches, pain in her cervical spine, and pain in her thoracic spine had nearly completely resolved but that she had persistent pain in the center of her lower lumbar spine that was not improving. Dr. Chimonas noted that Claimant was not currently working and was not looking for work. Dr. Chimonas assessed resolved concussion, resolved cervical strain, resolved thoracic strain, and strain of the lumbar region. Dr. Chimonas provided a work status of restricted duty with no lifting of more than 10 pounds and a 5 minute stretch break every hour. *See* Exhibit 16.

13. Claimant was evaluated by Dr. Chimonas on November 16, 2010, November 23, 2010, and December 8, 2010. Dr. Chimonas continued his assessment of strain of the lumbar region on these visits and he continued the restricted duty work status with restrictions of lifting no more than 10 pounds and a 5 minute stretch break every hour. *See* Exhibit 16.

14. On December 22, 2010 Claimant was evaluated by Dr. Chimonas. Dr. Chimonas noted it had been 10 weeks since the onset of pain and that Claimant continued to have pain in the low back. Dr. Chimonas noted that Claimant's pain had not improved and that Claimant was willing to consider an injection or surgery as a treatment option. Dr. Chimonas requested an MRI be performed and continued the work restrictions. Dr. Chimonas noted that Claimant had failed conservative treatment and that an MRI would be performed as part of an evaluation for injection or surgery. *See* Exhibit 16.

15. On January 3, 2011 Claimant underwent an MRI of her lumbar spine interpreted by Sarah Jess, M.D. Dr. Jess noted Claimant had mild degenerative facet arthropathy in the lower lumbar spine without significant spinal or foraminal stenosis, mild degenerative disc disease in the lower thoracic spine worst at T11-12 where there is mild right lateral recess and mild right foraminal stenosis, an annular tear at T11-12, and left lateral curvature of the lumbar spine which may be positional or related to muscle spasm. *See* Exhibit 18.

16. On January 7, 2011 Claimant was evaluated by Dr. Chimonas. Claimant reported continued pain in the lumbar spine. Dr. Chimonas noted a small bulge at T10-T11 that did not cause foraminal stenosis and did not impinge on the spinal cord was shown by MRI and that the MRI also showed degenerative facet hypertrophy at L4-5 and L5-S1. He noted otherwise her MRI was unremarkable. Dr. Chimonas opined that the T10-T11 bulge was probably not causing Claimant's pain. Dr. Chimonas noted again that Claimant had failed conservative treatment and Claimant indicated she would be willing to undergo an injection. Dr. Chimonas continued her work restrictions and referred her to see if she was a candidate for diagnostic or therapeutic facet injection. *See* Exhibit 16.

17. On January 27, 2011 Claimant was evaluated by Rebekah Martin, M.D. Dr. Martin gave the impression that Claimant had low back pain most consistent with

lumbar facet syndrome and lumbar spondylosis. Dr. Martin discussed with Claimant at length doing bilateral L4-5 and L5-S1injections and Claimant wished to give it more consideration before having the injections done. Dr. Martin agreed with work restrictions of a 10 pound weight limit and recommended Claimant limit any lumbar extension activity and limit lumbar lifting, bending, and stooping. Dr. Martin noted that Claimant would return for follow up evaluation or return sooner if she decided to undergo facet joint injections. *See* Exhibit 19.

18. On February 2, 2011 Claimant was evaluated by Dr. Chimonas. Claimant reported continued pain in the lumbar spine. Claimant reported she was not working and not looking for work. Dr. Chimonas opined that because Claimant had undergone extensive therapy and chiropractic manipulations without improvement that he did not think continued therapy would benefit Claimant. He recommended facet injections but noted Claimant was not interested in facet injections and that she wished to just continue with medications to control her pain. Dr. Chimonas opined that there was no additional treatment that would benefit Claimant. Dr. Chimonas opined that Claimant did not have a ratable condition as her pain did not correlate to a single lesion with demonstrable objective findings and that she had no permanent impairment. Dr. Chimonas opined that Claimant was at maximum medical improvement (MMI) and released her to regular duty work status. Dr. Chimonas recommended refills of tramadol and ibuprofen for three months as the only recommendation for maintenance care. Dr. Chimonas did not recommend any further medical treatment other than the prescription refills. *See* Exhibit 1.

19. On March 24, 2011 Respondents filed a Final Admission of Liability (FAL). The FAL admitted for medical benefits to date, a 0 % impairment, and no medical maintenance benefits after MMI. The FAL noted a MMI date of February 2, 2011.

20. On April 22, 2011 Claimant filed an objection to the FAL and filed a notice and proposal for a Division Independent Medical Examination (DIME).

21. Shortly after being placed at MMI by Dr. Chimonas, Claimant attempted to fill prescriptions for tramadol and ibuprofen as part of the recommended maintenance care. Insurer denied payment for the prescriptions.

22. Claimant did not present any evidence that she reported to Insurer the denial of payment for medications nor did she request they pay for the medications. Claimant did not submit a written request to change authorized treating providers due to a failure to treat for non-medical reasons or for due to the denial of payment of the prescriptions.

23. On May 22, 2011 Claimant sought treatment with her personal care provider, Jim Peterson, P.A.-C. Claimant was not referred to PA Peterson by a workers' compensation physician. PA Peterson noted Claimant's continued back pain. Claimant reported to PA Peterson that she was fired from employment one week after her injury after being advised that she had the wrong social security number. Claimant reported

being currently unemployed. PA Peterson noted that Claimant had a three year old and one year old at home. He performed an examination and recommended Claimant continue with her medication and that she undergo a multi-disciplinary care plan for de-conditioning, range of motion, and strengthening exercises. *See* Exhibit 20.

24. On July 11, 2011 PA Peterson evaluated Claimant and again recommended she continue with medication and therapies. PA Peterson also prescribed hydrocodone for her pain. *See* Exhibit 20.

25. From 2011 through 2014 the parties had ongoing disputes not addressed by this order.

26. On February 2, 2015 Claimant underwent a DIME performed by Clarence Henke, M.D. Dr. Henke issued a DIME report on February 24, 2015. Dr. Henke opined that Claimant was moderately obese and had slight levoscoliosis curvature at the mid thoracic level of her spine. He opined that her lumbar spine ranges of motion were moderately restricted by the enlarged abdomen and were approximately: flexion 30 degrees, extension 20 degrees, and bilateral rotation 30 degrees. Dr. Henke assessed resolved concussion, resolved neck strain, resolved thoracic strain, and partially resolved lumbar strain. Dr. Henke noted that the MRI lumbar spine identified moderate degenerative disc disease in the lower thoracic spine with annular tear of disc at T11-12 and L4-5 and L5-S1 bilateral facet hypertrophy without significant central canal or foraminal stenosis. Dr. Henke noted that Claimant had declined facet injections and that she wanted to follow her own home program and take medications as needed. Dr. Henke opined that Claimant was very obese and de-conditioned and recommended she follow a prescribed diet management program and exercise program to reduce her BMI level to 25. *See* Exhibit H.

27. Dr. Henke opined that Claimant had reached MMI on February 2, 2011 and opined that she had no permanent impairment rating. Dr. Henke did not recommend any medical maintenance care. *See* Exhibit H.

28. On March 9, 2015 Respondents filed a FAL consistent with DIME physician Dr. Henke's report.

29. On April 8, 2015 Claimant filed an Application for Hearing seeking to overcome the DIME physician's opinion.

30. On June 18, 2015 Jack Rook, M.D. evaluated Claimant. Dr. Rook noted that Claimant was referred to him for commentary regarding the DIME. Claimant reported continued low back pain. Dr. Rook performed lumbar range of motion testing per AMA criteria. Dr. Rook diagnosed chronic low back pain: myofascial pain syndrome, facet mediated pain, right sided sacroiliac joint dysfunction, and an essentially negative lower extremity neurological examination. Dr. Rook opined that DIME physician Dr. Henke did not abide by the level II accreditation process or criteria outlined in the AMA guides to the evaluation of permanent impairment, third edition. Dr.

Rook noted Dr. Henke's approximations of lumbar range of motion restrictions and opined that noting approximations and not performing actual measurements was highly unusual. Dr. Rook opined that Dr. Henke's report was incomplete. *See* Exhibit 21.

31. Dr. Rook opined that Claimant has functional limitations associated with her chronic low back pain and that she has objective findings both on physical examination and on diagnostic imaging studies. He opined that she warranted a permanent impairment rating of 15% whole person. Dr. Rook opined that Claimant warranted a Table 53 impairment for chronic low back pain associated with muscle spasms and lumber facet arthropathy changes which accounted for a 5% impairment. He opined that he then calculated an additional 10% whole person impairment based on lumbar range of motion data he obtained. Dr. Rook noted that Claimant did not wish to pursue any additional treatment at this point in time and therefore opined that she had reached MMI. *See* Exhibit 21.

32. At hearing, Dr. Rook testified consistent with his report. Dr. Rook opined that annular tears are usually the result of trauma but that Claimant's facet degenerative changes were longstanding. He opined that Claimant had a table 53 diagnosis and that both Dr. Chimonas and Dr. Henke erred. He opined that facet injections recommended in January of 2011 would have been diagnostic and possibly therapeutic and was unsure why Claimant was placed at MMI rather than being given injections. He opined that facet injections could be done as maintenance treatment and that it would be reasonable to have anti-inflammatory and mild pain relief medications for maintenance. He opined that surgery would not be recommended for Claimant's annular tear. Dr. Rook also noted that he had previously believed Claimant declined facet injections so agreed with February 2, 2011 as the correct MMI date. However, he opined that if Claimant had wanted the injections it would have altered his MMI opinion.

33. Dr. Rook opined that Dr. Henke erred in his DIME by failing to follow the Division and the AMA Guidelines. He opined that Dr. Henke should have used an inclinometer to obtain range of motion testing results and that Dr. Henke should have filled out Figure 83, a worksheet form, for her range of motion measurements. He opined that both Dr. Chimonas and Dr. Henke made gross errors by failing to find a Table 53 diagnosis and perform proper range of motion testing.

34. The conflict between Dr. Rook's rating of permanent impairment and the zero rating provided by DIME physician Dr. Henke (and supported by Dr. Chimonas) amounts, at most, to a difference of medical opinion. Dr. Rook believes Claimant has a Table 53 diagnosis. Both the DIME physician and Claimant's treating provider do not believe she has a Table 53 diagnosis.

35. The testimony of Claimant at hearing is not found persuasive. Claimant's testimony surrounding whether or not she wished to undergo facet injections when offered in 2011 is inconsistent with multiple documented medical reports made more contemporaneously with her injury that occurred approximately five years ago. Claimant reported to Dr. Chimonas, Dr. Martin, and more recently to Dr. Henke that she

did not wish to undergo injections. Claimant's testimony at hearing that she did wish to undergo injections and that she called and was denied the opportunity to undergo injections is not credible or persuasive and is inconsistent with the multiple medical reports made more contemporaneously with her treatment.

36. The emergent treatment as well as the treatment provided by Dr. Chimonas and Dr. Martin was authorized.

37. The treatment provided by PA Peterson was not authorized, was not in the chain of referral from an authorized treating provider, and the right of selection had not passed to Claimant based on Insurer's failure to pay for prescription medications.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME Opinion

The DIME physician's findings concerning the date of MMI and the degree of medical impairment are binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III) & (8)(c), C.R.S. "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. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). In other words, a DIME physician's findings may be not 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 (ICAO, Oct. 4, 2001). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. Whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating has been overcome by clear and convincing evidence are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). 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).

Claimant has failed to overcome Dr. Henke's DIME opinion by clear and convincing evidence. Claimant failed to show that it is highly probable that Dr. Henke was incorrect in determining that Claimant had 0% permanent impairment or that Claimant reached MMI on February 2, 2011. Although the DIME physician did not perform range of motion testing consistent with the AMA guidelines, range of motion testing is not required unless a physician first finds that a Claimant has a ratable condition and a Table 53 diagnosis. Dr. Henke did not find that Claimant had a Table 53 diagnosis and found that she had no permanent impairment. His opinion is consistent with the opinion of her treating physician Dr. Chimonas who opined that Claimant did not have a ratable condition as her pain did not correlate to a single lesion with demonstrable objective findings. Table 53 provides for impairments due to specific disorders of the spine related to intervetebral disc or other soft-tissue lesions. Claimant's authorized treating provider Dr. Chimonas examined Claimant on February 2, 2011 and determined that although Claimant was diffusely tender throughout the lower spine, she had no appreciable lumbar muscle spasms or increased tone and that there was no additional treatment that would benefit Claimant. He concluded Claimant did not have a ratable condition under Table 53, had no impairment, and was at MMI.

Dr. Henke similarly concluded that Claimant had no impairment and had reached MMI on February 2, 2011.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S**.** The persuasive evidence establishes that Claimant told Dr. Chimonas that she did not wish to undergo facet injections at her February 2, 2011 appointment. Claimant similarly reported to Dr. Martin and DIME physician Dr. Henke that she did not wish to undergo injections. Placing Claimant at MMI on February 2, 2011 was proper as at that point there were no further treatment options reasonably expected to improve Claimant's condition. Dr. Chimonas opined that as of February 2, 2011 Claimant had reached MMI and the DIME physician came to the same conclusion. Claimant has failed to show by clear and convincing evidence that the DIME physician's determination of MMI was in error or that there was further treatment after February 2, 2011 that was reasonably expected to improve her lumbar condition.

Although Claimant argues that Dr. Henke's opinion is in error and is substantially flawed, this is not persuasive. Rather, Dr. Henke's opinion is supported by the same opinion reached by Claimant's treating provider Dr. Chimonas. The differing opinion of Dr. Rook shows merely a difference in medical opinion as to whether Claimant qualifies for a permanent impairment rating based on the use of Table 53. Dr. Chimonas and Dr. Henke opined that she does not, and Dr. Rook opined that she does. This difference in opinion does not show that the DIME physician erred in failing to perform range of motion testing for the lumbar spine using an inclinometer as range of motion testing is not required unless and until a Table 53 diagnosis exists. As Dr. Henke opined that Claimant did not have a Table 53 diagnosis warranting impairment, he was not required to perform range of motion testing. Claimant has failed to show by clear and convincing evidence that the DIME physician's opinion that she suffered 0% impairment and reached MMI on February 2, 2011 was incorrect. Rather, the DIME physician's opinion is supported by the same opinion as Claimant's treating provider and there is merely a difference in opinion between DIME physician Dr. Henke and Dr. Rook.

Temporary Total Disability

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that her 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 that Claimant 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 his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Section 8-42-105(3)(a), C.R.S., provides that TTD benefits shall continue until Claimant reaches MMI. Section 8-42-107(8)(b)(I), C.R.S., provides that "an authorized treating physician shall make a determination as to when an injured employee reaches maximum medical improvement." If a party disputes the determination of an ATP that the claimant has reached MMI, that party may elect to seek a Division-sponsored independent medical examination (DIME) in accordance with § 8-42-107.2, C.R.S. Where the claimant proves an entitlement to TTD benefits, the burden of proof rests with the respondents to establish that the claimant has been placed at MMI by an ATP and justify a termination of TTD benefits under § 8-42-105(3)(a). *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P. 3d 790 (Colo. App. 2000); *Rakestraw v. American Medical Response,* W.C. No. 4-384-349 (I.C.A.O. October 3, 2005).

Claimant has established that after her industrial injury on October 4, 2010, she was off work through October 7, 2010. When she returned on October 8, 2010 she was accommodated within the work restrictions given to her by her treating provider until October 21, 2010. Starting October 21, 2010 Employer was unable to accommodate Claimant's restrictions or provide her light duty work. Claimant was unable to work and earn wages as of October 21, 2010 due to her industrial injury and Employer's unwillingness to accommodate her restrictions as of that date. Therefore, Claimant has established a causal connection between her industrial injury and her subsequent wage loss. Section 8-42-103(1)(b), C.R.S. provides that 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. Claimant has shown a causal connection between her industrial injury and her subsequent work restrictions and wage loss and has shown that her period of disability lasted longer than two weeks. Claimant's period of disability lasted until she was placed at MMI with no restrictions on February 2, 2011. Claimant has therefore established an entitlement to TTD benefits from October 4, 2010 through October 7, 2010 and again from October 21, 2010 through February 2, 2011 when she was placed at MMI. Once she was placed at MMI by her authorized treating provider, her entitlement to TTD benefits ceased.

Claimant's arguments that she is entitled to TTD benefits from February 2, 2011 through November 10, 2013 is not persuasive. Claimant's entitlement to TTD benefits end as of the date she reaches MMI which, as found above, was on February 2, 2011. After February 2, 2011 Claimant was released to full duty with no work restrictions and was at MMI. Claimant similarly has failed to show an entitlement to temporary partial disability (TPD) benefits from November 11, 2013 through June 18, 2015 as she was

properly placed at MMI on February 2, 2011 and no entitlement to TPD benefits exists in this case.

Authorized Providers

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). 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. *See* § 8-43-404 (5)(a)(I)(A), C.R.S.; *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *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). Whether an ATP has made a referral in the normal progression of authorized treatment is normally a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Claimant has established that the initial emergent treatment as well as the treatment provided by Dr. Chimonas and Dr. Martin was authorized. Claimant has failed to show that the treatment she sought with her personal provider PA Peterson was authorized. Claimant's argument that Insurer's refusal to pay for her prescription medications provided her with the ability to choose her own physician to further treat her workers' compensation injury is not persuasive. Claimant was evaluated by her personal provider, PA Peterson, after she had received significant treatment from an authorized treating provider, after she had been placed at MMI with no impairment, and after a FAL had been filed. Claimant's argument that she was denied medical treatment and was denied access to medical care is not persuasive. Although Insurer, in err, failed to pay for her prescription medications this failure to pay for prescription medications is not equivalent to an authorized physician refusing to provide medical treatment nor is it equivalent to a discharge from medical care for nonmedical reasons. Here, the authorized physician Dr. Chimonas did not refuse to provide medical treatment nor did Dr. Chimonas discharge Claimant from medical care for nonmedical reasons. Rather, Claimant underwent extensive treatment with Dr. Chimonas from October 6, 2010 through February 2, 2011 when he opined she was at MMI with no impairment and no need for future medical treatment other than a short period of continued prescription medications. Claimant has not shown that she contacted Insurer about the failure to pay for medications or that she made a request that they pay for the medications. She also has not shown that she submitted a written request to allow her to change physicians. Claimant has not established that a basis exists to support her argument that the right to select a physician passed to her in this case. Therefore, the treatment she sought on her own with her personal provider is not authorized and PA Peterson did not become an authorized provider in this matter.

Grover Medical Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Claimant has failed to establish that future medical treatment is reasonably necessary to relieve the effects of her industrial injury or to prevent further deterioration of her condition. Claimant's industrial injury was suffered approximately five years ago. The most recent evaluations by DIME physician Dr. Henke and by Claimant's retained physician Dr. Rook do not support or show substantial evidence that future medical treatment is reasonable and necessary to treat her injury. Although the doctors reference the recommendations made back in 2011 that Claimant undergo facet injections, there is no opinion that facet injections now would still reasonably be necessary to relieve the effects of Claimant's injury or would reasonably be necessary to prevent further deterioration of Claimant's current condition. Further, although Dr. Chimonas recommended three months of continued prescription medications in February of 2011, Claimant has failed to show that she still has a need for these prescription medications at this time several years later when her authorized treating provider had only recommended them for three months. Claimant has not presented sufficient evidence that facet injections or any other medical treatment is needed now or in the future to relieve the effects of her 2010 industrial injury or to prevent further deterioration of her condition. Therefore, her request for a general award of Grover medical benefits is denied.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The evidence presented by Claimant indicates that she was paid $11.92 per hour working 40 hours a week at the time she suffered her industrial injury. Therefore, at the time of her injury she was earning an average weekly wage of $476.80. Any indemnity benefits shall be based upon this average weekly wage.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME opinion by clear and convincing evidence. Claimant has no permanent impairment and reached MMI on February 2, 2011.

2. Claimant has established an entitlement to TTD benefits from October 4, 2010 through October 7, 2010 and from October 21, 2010 through February 2, 2011. Claimant has failed to establish an entitlement to any other indemnity benefits.

3 Claimant has established that her AWW at the time of her injury was $476.80. Insurer shall calculate her indemnity benefits based on this AWW.

4. Claimant has established that the emergent treatment and the treatment provided by Dr. Chimonas and Dr. Martin was authorized. Claimant has failed to establish that the treatment provided by PA Peterson was authorized.

5. Claimant has failed to establish an entitlement to medical maintenance benefits and her request for a general award of Grover medical benefits is denied and dismissed.

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

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

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

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2015 /s/ Michelle E. Jones

_____

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

ISSUES

I. Whether, following an approved stipulation wherein Respondents agreed to reopen the case and pay additional temporary total disability (TTD) benefits based upon a worsening of condition, the combined TTD and permanent partial (PPD) disability payments paid to Claimant in excess of the statutory cap under § 8-42-107.5, C.R.S. constitute an "overpayment" as that term is defined under § 8-40-201(15.5), C.R.S.; and if so,

II. Whether Respondents are entitled to take an offset for the overpayment of disability benefits against the disfigurement benefits award due and owing to Claimant in the amount of $1,600.00.

FINDINGS OF FACT

As noted, the parties presented this case to the ALJ for decision on hearing exhibits and the above referenced incomplete/ unsigned stipulation marked as Claimant's Exhibit 17. Based upon careful inspection of the documents comprising the evidentiary record, the ALJ finds that paragraphs 1-14 of the parties' incomplete and unsigned stipulation accurately set forth the medical and procedural history of the claim. Consequently, the ALJ adopts and incorporates paragraphs 1-14 of the parties' incomplete and unsigned stipulation in their entirety to find:

1. Claimant sustained industrial injuries on or about November 17, 2010. Respondents admitted liability.

2. Authorized treating physician Dr. Jinkins performed two surgeries on Claimant's right shoulder. Authorized treating physician Dr. Hattem placed Claimant at MMI on October 30, 2012 and issued a 20% upper extremity impairment rating. Respondents filed a final admission of liability on December 5, 2012.

3. Claimant objected to the final admission of liability and requested a Division IME. Dr. Sandell performed the Division IME on May 8, 2013. Dr. Sandell agreed Claimant had reached MMI, and he too issued a 20% upper extremity impairment rating. Respondents filed a final admission of liability on July 25, 2013. While the 20% rating was worth $10,613.41, Claimant received $5,166.57 due to application of the statutory cap in C.R.S. §8-42-107.5. Respondents admitted to a total of exactly $75,000.00 in combined TTD and PPD benefits.

4. Claimant objected to the final admission of liability and requested a hearing on

issues including overcoming the Division IME findings. Claimant later withdrew the application for hearing without prejudice, by agreement of the parties.

5. Dr. Jinkins continued to follow Claimant after MMI. A MRI on January 15, 2013 revealed what Dr. Jinkins found to be a new tear in claimant's right shoulder. Dr. Jinkins recommended repeat shoulder surgery. Respondents denied the request, and on December 17, 2013 they applied for a hearing on issues including the surgery Dr. Jinkins recommended.

6. In his response to the application for hearing, Claimant endorsed the issue of overcoming the Division IME findings of Dr. Sandell. Claimant also endorsed the issues of compensability of a left shoulder injury, bilateral carpal tunnel syndrome, and TTD and TPD benefits from October 30, 2012, ongoing. A hearing was scheduled for March 26, 2014 at 1:30 p.m. in Colorado Springs.

7. On March 25, 2014, The parties stipulated to the following;

   a. Respondents authorize the right shoulder surgery Dr. Jinkins has recommended.

   b. Respondents will pay TTD benefits to Claimant commencing the date of the right shoulder surgery, and continuing until terminated pursuant to law.

   c. Claimant withdraws, with prejudice, his claim that he sustained Injuries to his left shoulder, and that he sustained bilateral carpal tunnel syndrome, as a result of the effects of his original injury on November 17, 2010.

   d. Claimant withdraws, with prejudice, his claim for TTD and TPD benefits prior to the date of the right shoulder surgery that Respondents have agreed to authorize. As noted, Respondents agree to pay TTD benefits as of the date of the right shoulder surgery.

8. The Stipulation was approved by Order dated March 25, 2014. The hearing set for March 26, 2014 was vacated.

9. Dr. Jinkins performed right shoulder surgery on April 10, 2014. Respondents filed a General Admission of Liability on April 23, 2014, admitting to TTD as of April 10, 2014, and ongoing, "...until returned to MMI status."

10. Dr. Jinkins placed Claimant at MMI on March 23, 2015 and issued a 23% upper extremity impairment rating.

11. Respondents filed a final admission of liability on April 10, 2015. In the FAL,

Respondents stated that; "…As the claimant has been issued all indemnity up to the cap of $75,000.00 as per the Final Admission dated 7/25/13, all TTD paid from 4/10/14 – 4/082015 [sic] at $810.67 per week for 52 weeks is an overpayment."

12. Claimant attended a disfigurement hearing, and an order was issued on June 10, 2015 awarding him $1,600.00.

13. Respondents filed a final admission of liability on July 8, 2015. In it they stated that;

> "…As the claimant has been issued all indemnity up to the cap of $75,000.00 as per the Final Admission dated 7/25/13, all TTD paid from 4/10/14 – 4/082015 [sic] at $810.67 per week for 52 weeks is an overpayment. The TTD overpayment of $42,154.84 will be taken as a credit on any PPD owed and/or future settlement. Carrier also takes credit for previously paid PPD of $5,166.57 as per Final Admission dated 7/25/2013. Carrier admits to awarded disfigurement of $1,600.00. Carrier will deduct this award of $1,600.00 from the current overpayment credit of $42,154.84, therefore the current overpayment credit of $40,554.84 remains."

14. Claimant applied for hearings in response to the FAL's filed on April 10, 2015 and July 8, 2015. Claimant asserted;

> "Claimant contests the credits and overpayments asserted by Respondents. Respondents improperly claim that; "…As the claimant has been issued all indemnity up to the cap of $75,000.00 as per the Final Admission dated 7/25/13, all TTD paid from 4/10/14 – 4/082015 [sic] at $810.67 per week for 52 weeks is an overpayment." Claimant was not placed at MMI until 3/23/15. It is well settled that respondents must continue paying temporary disability benefits without application of the cap until such time as Claimant reaches MMI. See Leprino Foods v. ICAO, 134 P.3d 475 (Colo. App. 2005). Credits and overpayments do not apply to those benefits to which Claimant was entitled to receive. Respondents' claimed credits and overpayments are improper. C.R.S. 8-40-201(15.5)."

15. The ALJ finds that the intent of the parties March 25, 2014 stipulation was to avoid the expense and uncertainty of litigation by resolving the issues surrounding the compensable nature of alleged injuries to Claimant's left shoulder and bilateral hands and his challenge to MMI by compromising his claims of entitlement to medical benefits and additional TTD. Following careful review of the parties March 25, 2014 stipulation, the ALJ finds indication that Respondents intended to waive any right to claim an overpayment or offset any overpayment that may result as a consequence Claimant's receipt of additional TTD in accordance with the stipulation.

16. The ALJ also finds that Respondents paid Claimant 26 installments of TTD in the

amount of $1,621.34 for the time period extending from 4/10/2014 to 4/9/2015, for a total of $42,154.84 in excess of the $75,000.00 statutory cap pursuant to §8-42-107.5

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 any litigation. C.R.S. § 8-40-102(1).

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

Existence of an Overpayment- The Relevant Provisions of the Act

C. As noted above, the first issue presented involves application of C.R.S §8-42-107.5 to a lower cap case following an approved stipulation wherein Respondents agreed to reopen the case and pay additional temporary total disability (TTD) benefits based upon a worsening of condition. In relevant part, C.R.S. §8-42-107.5 holds:

> "[n]o claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. . . ."

Here, Respondents argue that since Claimant originally reached MMI on October 30, 2012, and was paid combined TTD and permanent partial disability (PPD) benefits up to the $75,000.00 cap, all TTD paid from 4/10/2014 through 4/8/2015 above the $75,000.00 cap constitutes money payments that exceed the amount that should have been paid pursuant to statute. Consequently, Respondents claim a $42,154.84 overpayment.

D. Citing *Leprino Foods v. ICAO*, 134 P.3d 475 (Colo.App. 2005), Claimant contests Respondents asserted overpayment arguing that "credits and overpayments do not apply to those benefits to which Claimant was entitled to receive". Based upon the

evidence presented, the ALJ concludes that while Claimant was entitled to receive additional TTD benefits, he received indemnity payments in excess of that which should have been paid pursuant to statute. Accordingly, the ALJ agrees with Respondents that Claimant has been overpaid.

E. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means 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 benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) 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. *See Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010). In this case, the ALJ agrees with Respondents that when §8-40-201(15.5), C.R.S. and §8-42-107.5, C.R.S are read together, the clear intent of the statutes provides that payment of combined TTD and PPD benefits in excess of the applicable statutory cap results in an "overpayment." As stated above, "overpayment" is defined as money received by a claimant that exceeds the amount that should have been paid. *Section 8-40-201(15.5), C.R.S*. Since the Claimant here received more than $75,000.00 in combined temporary disability payments and permanent partial disability payments, Respondents contend that the TTD received from April 10, 2014 to 4/8/15 constitutes money that exceeds the amount that should have been paid regardless of whether Claimant was "entitled" to receive it. Consequently, Respondents argue that under the circumstances the statutory definition of "overpayment" as set forth in §8-40-201(15.5), C.R.S. has been satisfied. The ALJ agrees finding the holding in *Ryan Danks v. Rayburn Enterprises, Inc.,* W.C. No. 4-770-978-01(ICAO, September 10, 2014) instructive. In *Danks*, the Panel concluded that payment of combined TTD and PPD in the amount of $11,657.39 beyond $150,000 cap, following a reopening of the case due to rescission of MMI, constituted an overpayment in benefits which entitled respondents to an offset against liability for unpaid disfigurement benefits. The facts presented in *Danks* are analogous to those presented here.

F. Similar to the situation presented in *Danks*, the instant case involves a Claimant whose condition worsened. In this case, that worsening lead the parties to reach a stipulation that authorized additional surgery which resulted in the rescission of MMI, thus entitling Claimant to additional TTD benefits. Nonetheless, based upon the evidence presented, Claimant received money that exceeded the amount that should have been paid pursuant to §8-42-107.5. The ALJ is not convinced that the approved

stipulation dated March 25, 2014 or Claimant's subsequent surgery, which effectively rescinded MMI mandates a conclusion that no overpayment exists in this case.

G. It is well settled that a party may stipulate away valuable rights so long as it is not a violation of public policy. *Cherokee Metropolitan Dist. v. Simpson,* 148 P.3d 142, 151 (Colo. 2006); *USI Properties East, Inc. v. Simpson,* 938 P.2d 168, 173 (Colo. 1997). "A party's participation in a stipulation incorporated into a decree precludes that party from advancing legal contentions contrary to the plain and unambiguous terms contained therein." *USI Properties East, Inc. v. Simpson,* 938 P.2d at 173. Courts should give effect to stipulations, but "if there is a sound reason in law or equity for avoiding or repudiating a stipulation, a party is entitled to be relieved from its requirements upon timely application." *Lake Meredith Reservoir Co. v. Amity Mut. Irrigation Co.,* 698 P.2d 1340, 1346 (Colo. 1985). Whether to relieve a party of a stipulation is within the discretion of the trial court. *Id.* Here, the unambiguous language of the parties March 25, 2014 stipulation, approved by order of ALJ Stuber, indicates that in return for Claimant withdrawing claims for additional injuries to his left shoulder and bilateral hands, Respondents agreed to authorize the additional right shoulder surgery recommended by Dr. Jinkins. Moreover, the stipulation plainly provides that in return for Claimant's withdrawal of any claims for TTD and temporary partial disability (TPD) prior to the date of any right shoulder surgery, Respondents agreed to pay TTD benefits "commencing the date of the right shoulder surgery, and continuing until terminated pursuant to law". As found, there is no indication in the March 25, 2014 stipulation that Respondents intended to waive their right to claim any overpayment or credit should an overpayment arise as a consequence of Claimant's receipt of additional TTD. Giving effect to the stipulation leads to the inescapable conclusion that Respondents simply agreed to commence TTD once Claimant underwent surgery and continue TTD payments until they were permitted by law to terminate them rather than a conclusion that Respondents agreed to pay Claimant beyond the statutory cap while ignoring their rights concerning recovery and/or entitlement to credit. Respondents have not sought to be relieved from the stipulation and Claimant presented no evidence outlining a basis in law or equity to repudiate it.

H. Furthermore, the ALJ rejects, as misplaced, Claimant's reliance on the holding in *Leprino Foods*, *supra*, as standing for the proposition that the overpayment and asserted right to credit is this case does not apply because Claimant was entitled to receive the additional TTD. To the contrary, the ALJ concludes that the holding in *Leprino, citing Donald B. Murphy Contractors, Inc. v. Industrial Claims Appeals Office,* 916 P.2d 611 (Colo.App. 1995), stands for the proposition that Respondents are required to continue paying TTD benefits without application of the cap until such time as the Claimant reaches MMI, because the extent of Claimant's impairment could not be determined before such time. Based upon the evidence presented, the ALJ finds and concludes that Respondents followed March 25, 2014 stipulation and the holding of *Leprino* and its progeny by paying Claimant TTD until such time that he was returned to MMI with additional impairment by Dr. Jenkins on March 23, 2015. Thus, the fact that Claimant was "entitled" to receive TTD until be placed at MMI and his impairment determined does not negate the fact that he was paid benefits in excess of what should

have been paid given Dr. Jenkins assignment of 23% scheduled impairment upon being returned to MMI on March 23, 2015. Consequently, the ALJ concludes that under the circumstances of this case, Respondent has, demonstrated by a preponderance of the evidence that an "overpayment" as that term is defined in §8-40-201(15.5), C.R.S. exits in this case. Thus, consistent with the holding in *Danks*, Respondents may reduce the amount of the overpayment by taking credit against their liability for the unpaid disfigurement benefits awarded to Claimant. *See also*, *Donald B. Murphy Contractors, Inc. v. Industrial Claims Appeals Office,* 916 P.2d 611 (Colo.App. 1995)(petitioners entitled to offset permanent partial benefits against temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Respondents may reduce the amount of the overpayment by taking credit against their liability for the unpaid disfigurement benefits awarded to Claimant.

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: September 24, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

Whether the left hip surgery (arthroscopy and/or labral debridement and osteoplastic repair of femur accetebulm, or both, and possible microfracture) recommended by Dr. Xenos is reasonable, necessary, and related to Claimant's April 24, 2011, injury.

FINDINGS OF FACT

1. On April 24, 2011, while in the course and scope of employment with respondent-employer, the claimant was attempting to catch a patient from falling when she was pinned between the patient and the wall. An admission of liability was filed.

2. In the Boulder Community Hospital Emergency Department Report the claimant's complaint was back pain.

3. The claimant did not begin having any hip complaints or pain until one year and eight months after her injury. This is consistent with the history the claimant provided to Dr. Kathy McCranie on June 17, 2014.

4. In the report of September 10, 2014, the claimant reports that she was having left hip pain for approximately three months. The claimant confirmed that this was the approximate time when she did begin to have left hip pain. At hearing, she further took the position that she was not claiming that this arose from the initial injury but her left hip pain and need for surgery was a result of overuse or altered gait not from an injury.

5. In the report of February 13, 2015, Dr. Xenos believed the claimant had a left hip labral tear and femoral acetabular impingement. Subsequent to that time a surgical request for "left hip labral tear, femoral acetabular impingement unspecified disorder of joint of pelvic region was requested.

6. A denial for the surgery was made by the respondent-insurer and the issue was set for hearing.

7. The respondent-insurer sought the opinion of Henry J. Roth, M.D. in regard to the relatedness of surgery. Dr. Roth testified in person at the hearing and explained the procedure that is being requested. Dr. Roth indicated he did an extensive evaluation including research, which is contained within his report, and spent approximately 25-30 hours in review of records.

8. After extensive review of the records and literature, Dr. Roth opined that the left hip condition experienced by the claimant is essentially that of the right hip. He opined that the left hip pain and the underlying abnormal anatomy are congenital in nature. The medical records indicate that her condition is a result of pincer-impingement and a CAM lesion.

9. The femoroacetabular impingement (FAI) can begin at adolescence and progress into adulthood causing pain and injury to the labrum and articular cartilage of the hip. Generally FAIs are either CAM or pincer type. The records indicate that the claimant had contributions from both pincer impingement and a CAM lesion. As testified by Dr. Roth, the claimant's need for surgery arises from congenital defects and would have caused her condition with or without the original workers' compensation injury or the subsequent right hip surgery which the claimant believes created her altered gait. This opinion was based on his personal experience with hip surgeries and his multiple years as a physician who has treated these conditions supplemented by multiple hours of research.

10. In evaluating the same complaints and essentially the same condition in the right hip, Dr. McCranie in her report of October 14, 2014 was unable to find any relationship of the right hip to the original workers' compensation injury.

11. Dr. John Douthit in his report opined that there was no evidence that the claimant sustained an injury to her right hip and given the fact the pain generators were unclear, she had good range of motion, x-rays were normal, he could find no relationship of the right hip surgery as related to this claim.

12. Dr. Roth's opinion is that the conditions of both the right and left hip would have occurred regardless of her workers' compensation injury.

13. In a report dated April 15, 2015, Dr. Xenos opined that he believed the need for the left hip surgery was related to the original injury because "she had a distinct injury followed by acute onset of symptoms …"

14. The ALJ finds the analyses and opinions of Dr. Roth to be more credible and persuasive than medical analyses and opinions to the contrary.

15. The ALJ finds that the claimant has failed to establish that it is more likely than not that the surgery recommended by Dr. Xenos for the claimant's left hip condition is reasonable, necessary, or related to the claimant's industrial injury of April 24, 2011.

CONCLUSIONS OF LAW

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

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

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

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337

(Colo. App. 1997), *cert. denied* September 15, 1997. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

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

6. The ALJ concludes that Dr. Roth's analyses and opinions that the recommended surgery is not reasonable, necessary, or related to the claimant's October 22, 2013 injury is found to be more credible and persuasive than medical analyses and opinions to the contrary.

7. As found, the claimant has failed to establish by a preponderance of the evidence that the need for the hip surgery recommended by Dr. Xenos is reasonable, necessary, or causally related to her April 24, 2011 industrial 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. Xenos 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: September 15, 2015

/s/ original signed by:

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

CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by electronic mail addressed as follows:

Matthew C. Gizzi, Esq.
sernay@fdazar.com

Emily F. Ahnell, Esq.
eahnell@tpm-law.com

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

Date: **9/4/15** **Gabriela Chavez**
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-877-682-05

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Joseph Fillmore, M.D. that he reached Maximum Medical Improvement (MMI) on April 22, 2013.

2. Whether Claimant has presented a preponderance of the evidence to overcome Dr. Fillmore's 0% permanent impairment rating for his left upper extremity injury.

FINDINGS OF FACT

1. On January 15, 2012 Claimant suffered an admitted injury to his left upper extremity. While working as a Truck Driver for Employer he attempted to release the "5th wheel lever" underneath his truck with his left arm because of icy roads. When the lever became stuck Claimant slipped on ice, fell to the ground and experienced immediate left shoulder pain.

2. Claimant was transported to St. Anthony's Hospital. X-rays did not reveal any fractures and physicians suspected a rotator cuff injury. He subsequently received

pain medications, was taken off work and underwent an MRI. The MRI reflected minor cystic changes but no full thickness rotator cuff tear. Additional nerve testing revealed a left brachial plexus injury.

3. On May 21, 2012 Claimant visited Authorized Treating Physician (ATP) Michael B. Tracy, D.O. for an evaluation. Dr. Tracy diagnosed Claimant with a left brachial plexopathy and MRI imaging consistent with a partial tear of the suprapinatus tendon. There was no diagnosis of a labral tear. Dr. Tracy performed a therapeutic corticosteroid injection into the left subacromial space.

4. On November 7, 2012 Claimant returned to Dr. Tracy for an evaluation of his left brachial plexus injury. Claimant reported that his pain medications were 60% to 75% effective and improved his activity levels. During the physical examination he was in moderate physical discomfort and exhibited multiple pain behaviors. Dr. Tracy diagnosed Claimant with improving brachial plexopathy, a nonsurgical left shoulder labral tear and delayed recovery with psychogenic pain components.

5. Claimant continued to receive treatment from Dr. Tracy. By March 28, 2013 he reported that his pain medications permitted him to be approximately 45% functional. Claimant's pain behaviors were better with distraction and his left shoulder examination had improved. Dr. Tracy did not perform any impingement testing on Claimant's shoulders.

6. On April 22, 2013 Respondents conducted video surveillance of Claimant. The surveillance video revealed Claimant grasping a ball throwing device for his dog with his left hand, gripping onto the gate of a chain link fence, bending over with his left shoulder raised at or above head level, bringing his left arm and shoulder up to adjust his winter cap and lifting his left hand up to his mouth and face.

7. On May 28, 2013 Claimant underwent an independent medical examination with John J. Raschbacher, M.D. Claimant exhibited diffuse left upper extremity tenderness to palpation. Dr. Raschbacher noted that Claimant would clutch his left hand, flex at the elbow and raise it up to forward flex the shoulder to 80-90 degrees. He remarked that Claimant demonstrated significant pain behaviors. Dr. Raschbacher noted that Claimant experienced a great deal of deliberation and apparent labor with elbow flexion.

8. Dr. Raschbacher diagnosed Claimant with a left shoulder strain and possible brachial plexopathy. He determined that Claimant had inaccurately reported and misrepresented the degree of symptomatology. Dr. Raschbacher noted that Claimant's functional abilities on video surveillance were grossly inconsistent with his presentation. He concluded that Claimant had reached MMI on the date of the video surveillance or April 22, 2013. Dr. Raschbacher also noted that it was much more likely that Claimant had reached MMI "well before" April 22, 2013. He explained that it was not possible to find a rational basis for an impairment rating because of Claimant's grossly inconsistent reports of symptomatology and functional abilities.

9. On January 21, 2014 Claimant returned to Dr. Tracy for an examination. Claimant reported that his medications permitted him to be approximately 24% functional. Dr. Tracy diagnosed Claimant with brachial plexus lesions, a superior glenoid labrum lesion and sleep disturbances. He did not perform any impingement testing on Claimant's shoulders.

10. Because Claimant had been injured on January 12, 2012 and Dr. Tracy had not placed him at MMI, Respondents sought a 24-month DIME. On May 29, 2014 Claimant underwent the DIME with Joseph H. Fillmore, M.D. Dr. Fillmore diagnosed Claimant with left brachial plexopathy, a previous history of cervical neck surgery and a left shoulder strain with underlying degenerative changes. He also noted that Claimant had a brachial plexus injury as documented by two electrodiagnostic tests. Dr. Fillmore explained that Claimant exhibited significant pain behaviors upon examination. Moreover, the medical records revealed that Claimant repeatedly demonstrated non-physiologic findings upon examination. Furthermore, after reviewing the April 22, 2013 surveillance video, Dr. Fillmore remarked that Claimant demonstrated significantly more left arm capabilities than upon examination. Notably, Claimant was able to lift his left arm up to the top of his head without any visible signs of discomfort. Dr. Fillmore agreed with Dr. Raschbacher's observations that "the activities and functional abilities recorded on the video surveillance [were] grossly inconsistent with his presentation." Dr. Fillmore also determined that Claimant reached MMI on the date of the video surveillance or April 22, 2013.

11. Dr. Fillmore assigned Claimant a 0% impairment rating for his January 15, 2012 industrial accident. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*), he explained that Table 13 outlines impairment ratings for brachial plexus injuries. Dr. Fillmore specifically remarked that brachial plexus impairments are to be graded for motor impairment pursuant to Tables 10 and 11 on page 42 of the *AMA Guides*. He commented that, pursuant to page 44, "impairment due to brachial plexus injury or disease can be determined by evaluating the various functions that are lost." However, Dr. Fillmore declined to assign Claimant an impairment rating because Claimant did not accurately report his symptoms and functional levels regarding sensation or provide full effort to grade motor skills. He summarized that Claimant's reports were grossly inconsistent with his symptoms and functional abilities exhibited on the video surveillance.

12. On November 17, 2014 Claimant returned to Dr. Tracy for an evaluation. Dr. Tracy noted that Claimant continued to exhibit pain behaviors. He determined that Claimant reached MMI on June 16, 2014 and assigned a 32% left upper extremity impairment rating. Dr. Tracy converted the extremity rating to a 19% whole person impairment. He remarked that, because Claimant's brachial plexus injury was so severe, he could not properly evaluate Claimant's shoulder concerns. Dr. Tracy thus recommended a repeat left shoulder MRI to compare with the February 28, 2012 MRI to determine causality for Claimant's left shoulder symptoms.

13. On March 16, 2015 Claimant underwent a repeat left shoulder MRI. The MRI did not reveal a rotator cuff tear or shoulder atrophy. However, the MRI reflected

an anterior inferior labral tear that Dr. Tracy attributed to Claimant's January 15, 2012 industrial injury.

14. Dr. Tracy testified at the hearing in this matter. After reviewing two MRI's and an EMG he concurred that Claimant suffered a brachial plexus stretch injury, a partial tear of the supraspinatus tendon and a left labral tear as a result of his January 15, 2012 industrial accident. Dr. Tracy specifically remarked that Claimant sustained the following: (1) a brachial plexus injury that has taken more than two to three years to recover; and (2) a labral tear or a mechanical shoulder injury inside the joint that was deferred from treatment because of Claimant's brachial plexus injury.

15. Dr. Tracy maintained that Claimant had reached MMI for his brachial plexus injury on June 14, 2014. He assigned a 32% upper extremity impairment that converted to a 19% whole person rating because of his extensive nerve damage as a result of the January 15, 2012 industrial injury. However, Dr. Tracy commented that, because Claimant's left shoulder labral tear has not been adequately addressed, he has not reached MMI for the condition. He could not assign an impairment rating for the labral tear because Claimant requires surgery.

16. Dr. Tracy reviewed the April 22, 2013 video surveillance of Claimant. He acknowledged that Claimant exhibited greater left arm movement on the video than he had in the office. Dr. Tracy also recognized that Claimant's reported symptoms were not always accurate.

17. Dr. Tracy remarked that he disagreed with Dr. Fillmore's MMI determination because the opinion was based upon Claimant's range of motion, symptom magnification and pain behaviors. Moreover, Dr. Fillmore used incorrect tables from the *AMA Guides* in evaluating Claimant's brachial plexus injury. However, he acknowledged that he only had a difference of opinion with Dr. Fillmore.

18. Dr. Raschbacher testified at the hearing in this matter. He explained that Claimant gave poor effort during his physical examination. Dr. Raschbacher remarked that Claimant exhibited pain behavior when he clutched his left hand with the right, flexed the elbow, bent the elbow and raised it up. He testified that he did not diagnose a labral tear because imaging studies did not show a labral tear and the orthopedic notes did not reveal a clear diagnosis of a labral tear. Dr. Raschbacher maintained that Claimant reached MMI on April 22, 2013 because he reported symptoms were inaccurate and his subjective symptoms were unreliable.

19. Dr. Raschbacher testified that Claimant's brachial plexus was abnormal and providing an impairment rating was a function of both the sensory and motor aspects of the nerve. However, he remarked that the brachial plexus injury was not ratable because Claimant did not provide full and fair effort in terms of testing strength, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and his pain behavior was vastly out of proportion compared to typical symptoms of a brachial plexus injury. Dr. Rasbacher thus agreed with Dr. Fillmore that Claimant reached MMI on April 22, 2013 with a 0% impairment rating. He noted that

Claimant provided a poor effort for Dr. Fillmore and could not receive a rating for his brachial plexus injury. A ratable impairment requires a full effort to determine functional abilities.

20. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fillmore that he reached MMI on April 22, 2013. On January 15, 2012 Claimant suffered an admitted injury to his left upper extremity. After undergoing extensive conservative treatment for his condition with ATP Dr. Tracy and other medical providers without reaching MMI, Respondents sought a 24-month DIME. Dr. Fillmore diagnosed Claimant with left brachial plexopathy, a previous history of cervical neck surgery and a left shoulder strain with underlying degenerative changes. He noted that Claimant had a brachial plexus injury as documented by two electrodiagnostic tests. Dr. Fillmore explained that Claimant exhibited significant pain behaviors upon examination. Moreover, the medical records revealed that Claimant repeatedly demonstrated non-physiologic findings upon examination. Furthermore, after reviewing the April 22, 2013 surveillance video, Dr. Fillmore remarked that Claimant demonstrated significantly more left arm capabilities than upon examination. He agreed with Dr. Raschbacher's observations that "the activities and functional abilities recorded on the video surveillance [were] grossly inconsistent with his presentation." Dr. Fillmore also determined that Claimant reached MMI on the date of the video surveillance or April 22, 2013.

21. Dr. Raschbacher determined that Claimant had inaccurately reported and misrepresented his degree of symptomatology. Dr. Raschbacher noted that Claimant's functional abilities on the video surveillance were grossly inconsistent with his presentation. He testified that he did not diagnose a labral tear because imaging studies did not show a labral tear and the orthopedic notes did not reveal a clear diagnosis of a tear. Dr. Rasbacher thus agreed with Dr. Fillmore that Claimant reached MMI on April 22, 2013.

22. In contrast, Dr. Tracy determined that Claimant had reached MMI for his brachial plexus injury on June 14, 2014. Dr. Tracy remarked that he disagreed with Dr. Fillmore's MMI determination because the opinion was based upon Claimant's range of motion, symptom magnification and pain behaviors. Moreover, Dr. Tracy commented that, because Claimant's left shoulder labral tear had not been adequately addressed, he has not reached MMI for the condition. However, he acknowledged that Claimant exhibited greater left arm movement on the video than he had in the office. Dr. Tracy also recognized that Claimant's reported symptoms were not always accurate. Finally, he acknowledged that he only had a difference of opinion with Dr. Fillmore. Accordingly, based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Raschbacher, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's MMI determination was incorrect.

23. Claimant has failed to present a preponderance of the evidence to overcome Dr. Fillmore's 0% permanent impairment rating for his left upper extremity injury. Relying on the *AMA Guides*, he explained that Table 13 outlines impairment

ratings for brachial plexus injuries. Dr. Fillmore specifically remarked that brachial plexus impairments are to be graded for motor impairment pursuant to Tables 10 and 11 on page 42 of the *AMA Guides*. However, Dr. Fillmore declined to assign Claimant an impairment rating because Claimant did not accurately report his symptoms and functional levels or exhibit full effort to grade motor skills. He summarized that Claimant's reports were grossly inconsistent with his symptoms and functional abilities exhibited on the video surveillance.

24. Dr. Raschbacher testified that Claimant's brachial plexus was abnormal and providing an impairment rating was a function of both the sensory and motor aspects of the nerve. He remarked that the brachial plexus injury was not ratable because Claimant did not provide full and fair effort in terms of testing strength, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and his pain behavior was vastly out of proportion to typical symptoms of a brachial plexus injury. Dr. Raschbacher thus agreed with Dr. Fillmore and assigned Claimant a 0% permanent impairment rating.

25. In contrast, Dr. Tracy assigned a 32% upper extremity impairment that converted to a 19% whole person rating because of his extensive nerve damage as a result of the January 15, 2012 industrial injury. He noted that Dr. Fillmore used incorrect tables in the *AMA Guides* in evaluating Claimant's brachial plexus injury. However, Dr. Fillmore and Dr. Rasbacher persuasively determined that Claimant's brachial plexus condition could not be accurately rated. An impairment rating could not be assigned because Claimant did not accurately report his functional levels, did not provide full effort, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and he exhibited exaggerated pain behaviors. Accordingly, Claimant suffered a 0% permanent impairment as a result of his January 15, 2012 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 a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

Maximum Medical Improvement

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

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fillmore that he reached MMI on April 22, 2013. On January 15, 2012 Claimant suffered an admitted injury to his left upper extremity. After undergoing extensive conservative treatment for his condition with ATP Dr. Tracy and

other medical providers without reaching MMI, Respondents sought a 24-month DIME. Dr. Fillmore diagnosed Claimant with left brachial plexopathy, a previous history of cervical neck surgery and a left shoulder strain with underlying degenerative changes. He noted that Claimant had a brachial plexus injury as documented by two electrodiagnostic tests. Dr. Fillmore explained that Claimant exhibited significant pain behaviors upon examination. Moreover, the medical records revealed that Claimant repeatedly demonstrated non-physiologic findings upon examination. Furthermore, after reviewing the April 22, 2013 surveillance video, Dr. Fillmore remarked that Claimant demonstrated significantly more left arm capabilities than upon examination. He agreed with Dr. Raschbacher's observations that "the activities and functional abilities recorded on the video surveillance [were] grossly inconsistent with his presentation." Dr. Fillmore also determined that Claimant reached MMI on the date of the video surveillance or April 22, 2013.

8. As found, Dr. Raschbacher determined that Claimant had inaccurately reported and misrepresented his degree of symptomatology. Dr. Raschbacher noted that Claimant's functional abilities on the video surveillance were grossly inconsistent with his presentation. He testified that he did not diagnose a labral tear because imaging studies did not show a labral tear and the orthopedic notes did not reveal a clear diagnosis of a tear. Dr. Rasbacher thus agreed with Dr. Fillmore that Claimant reached MMI on April 22, 2013.

9. As found, in contrast, Dr. Tracy determined that Claimant had reached MMI for his brachial plexus injury on June 14, 2014. Dr. Tracy remarked that he disagreed with Dr. Fillmore's MMI determination because the opinion was based upon Claimant's range of motion, symptom magnification and pain behaviors. Moreover, Dr. Tracy commented that, because Claimant's left shoulder labral tear had not been adequately addressed, he has not reached MMI for the condition. However, he acknowledged that Claimant exhibited greater left arm movement on the video than he had in the office. Dr. Tracy also recognized that Claimant's reported symptoms were not always accurate. Finally, he acknowledged that he only had a difference of opinion with Dr. Fillmore. Accordingly, based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Raschbacher, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's MMI determination was incorrect.

Permanent Impairment

10. The increased burden of proof required by DIME procedures is only applicable to non-scheduled impairments and is inapplicable to scheduled injuries in determining permanent impairment. *See Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000); *In Re Kamakele,* W.C. No. 4-732-992 (Apr. 26, 2010); *In Re Maestas,* W.C. No. 4-662-369 (ICAP, June 5, 2007); *see also* §8-42-107(8), C.R.S. Claimant suffered an admitted upper extremity left shoulder injury and Dr. Fillmore assigned a 0% permanent impairment rating. Because Claimant has suffered a scheduled impairment, Dr. Fillmore's opinion is not entitled to increased deference regarding permanent impairment.

11. As found, Claimant has failed to present a preponderance of the evidence to overcome Dr. Fillmore's 0% permanent impairment rating for his left upper extremity injury. Relying on the *AMA Guides*, he explained that Table 13 outlines impairment ratings for brachial plexus injuries. Dr. Fillmore specifically remarked that brachial plexus impairments are to be graded for motor impairment pursuant to Tables 10 and 11 on page 42 of the *AMA Guides*. However, Dr. Fillmore declined to assign Claimant an impairment rating because Claimant did not accurately report his symptoms and functional levels or exhibit full effort to grade motor skills. He summarized that Claimant's reports were grossly inconsistent with his symptoms and functional abilities exhibited on the video surveillance.

12. As found, Dr. Raschbacher testified that Claimant's brachial plexus was abnormal and providing an impairment rating was a function of both the sensory and motor aspects of the nerve. He remarked that the brachial plexus injury was not ratable because Claimant did not provide full and fair effort in terms of testing strength, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and his pain behavior was vastly out of proportion to typical symptoms of a brachial plexus injury. Dr. Raschbacher thus agreed with Dr. Fillmore and assigned Claimant a 0% permanent impairment rating.

13. As found, in contrast Dr. Tracy assigned a 32% upper extremity impairment that converted to a 19% whole person rating because of his extensive nerve damage as a result of the January 15, 2012 industrial injury. He noted that Dr. Fillmore used incorrect tables in the *AMA Guides* in evaluating Claimant's brachial plexus injury. However, Dr. Fillmore and Dr. Rasbacher persuasively determined that Claimant's brachial plexus condition could not be accurately rated. An impairment rating could not be assigned because Claimant did not accurately report his functional levels, did not provide full effort, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and he exhibited exaggerated pain behaviors. Accordingly, Claimant suffered a 0% permanent impairment as a result of his January 15, 2012 industrial injury.

ORDER

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

1. Claimant reached MMI on April 22, 2013 with a 0% permanent impairment rating.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

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

DATED: September 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-883-316

SSUE:

➢ Whether Claimant proved by a preponderance of the evidence that her claim should be reopened.

FINDINGS OF FACT

Based on the evidence present at hearing the Judge enters the following findings of fact.

1. On January 15, 2011, Claimant, a 51 year old female, was employed with Vail Resorts as a ski instructor. While teaching a ski lesson, Claimant was struck on her left side by another skier. She testified that the skier who hit her was in a semi-tucked position and that his skis hit her boots sending her ten feet into the air and twenty feet down the mountain. Claimant landed "100%" on her left side. Claimant testified she finished her ski lesson that day and over the next few days continued to experience pain and symptoms including grogginess and soreness. Claimant testified inconsistently that the immediate pain in her in her bilateral hips was "killing her." Claimant testified she experienced anterior pain in the left and right hips.

2. Claimant reported her injury to her manager before leaving the scene.

3. On January 25, 2011, Claimant presented to Vail Medical Center, an authorized treating provider, and underwent an evaluation with nurse practitioner JoAnn Kargul. The pain diagram on the date of the evaluation indicated complaints with regards to her neck, lower back, and hips. The diagram further indicates pain in the 2/10 level for her low back and hip. Claimant advised NP Kargul that she fell on her left thigh and hip. She denied hitting her head or loss of consciousness. The onset of her left hip and lower back pain was the night following the collision. She began experiencing right hip pain approximately three days after the collision.

4. Claimant worked the ten days after the accident without seeking medical attention. NP Kargul noted that Claimant "has been working and teaching skiing since the date of injury without difficulty." NP Kargul's physical examination revealed, "Hips, no pain on palpation bilaterally." Additionally, the examination showed, "good strength with hip flexor movement. Full range of motion with external and internal rotation." NP Kargul noted "right thigh, pain on palpation along the anterior and lateral aspect of the right thigh." NP Kargul assessed Claimant with cervical pain, low back pain, left thigh contusion, and right thigh pain. She released Claimant to full duty without restrictions.

5. On February 1, 2011, Claimant returned to Vail Valley Medical Center and NP Kargul evaluated her again. Claimant advised she had been teaching full time without any restrictions and had not experienced any problems. Claimant described

right hip pain on the inside of her leg, but no pain while it rest. Claimant denied pain in her right hip for the past two days. Claimant denied any continued right thigh pain. Physical examination revealed, "hips: no pain on palpation bilaterally. Patrick stress test with some discomfort in the posterior hip." Additionally, physical examination revealed, "Good extension with hip flexion and extension."

6. NP Kargul recommended Claimant commence physical therapy two to three times per week for the next two weeks. It is unclear from NP Kargul's report what the physical therapy was for because Claimant's cervical pain had resolved; she had no lumbar issues noted on exam; her left thigh bruise had improved; and her right thigh pain had resolved. However, notes from Howard Head Sports Medicine Centers indicate the referral was for low back pain and left thigh contusion. Despite the referral being for low back pain and left thigh contusion, the physical therapy notes reflect the actual focus of her physical therapy was Claimant's right hip and pelvis.

7. By February 3, 2011, Claimant advised her physical therapist that she was "feeling much better overall." She described pain level of 3/10 with bilateral buttock pain, which she described as a "Charlie horse."

8. On February 5, 2011, Claimant reported further improvement regarding her right hip and glute area, with some remaining pain/tenderness. At this point, Claimant was participating in "spin classes" without pain.

9. On February 10, 2011, Claimant returned to physical therapy. Regarding her subjective examination, Claimant indicated that she experienced right glute pain intermittently into the posterior lower extremity. The subjective examination did not reveal a right hip complaint.

10. On February 15, 2011, Claimant returned to the physical therapist. Claimant described her current pain level as 1/10. She noted slight glute tenderness but was able to ski and perform all job duties without limitations. The physical therapist noted that Claimant exhibited a good prognosis and recommended discharge from skilled rehabilitation therapy in conjunction with a home exercise program.

11. On that same day, Claimant returned to NP Kargul. Claimant advised that she was "100% better" and she reported feeling ready to go back to work full-time without any difficulty. She denied any pain, numbness, tingling, bowel, or bladder problems. She did note some muscle tightness in different muscle areas at times but otherwise was doing well. Physical examination revealed, "hips: no pain on palpation bilaterally. Full range of motion." Accordingly, Claimant was placed at maximum medical improvement (MMI) with no impairment and no need for further medical treatment upon review by Dr. Cebrian.

12. On her own, Claimant returned to physical therapy on March 15, 2011. Claimant described, "slight right glute tenderness but able to ski and to perform all job duties without limitations."

13. Claimant testified she skied approximately 45 to 50 days over the remaining ski season, through April 2011. Further, Claimant testified she did not seek medical treatment during this period.

14. On May 3, 2011, Claimant presented to her personal physician for an annual examination. Under review of systems for muscular skeletal, Dr. Bock noted, "not present, joint pain and muscle pain." Additionally, under the subjective, "patient words: here for annual exam. No change in her health. No complaints today." Dr. Boch performed a lower extremity inspection which returned normal.

15. Claimant testified that during the summer of 2011, she drove a client's car from Colorado to Chicago. During the drive she began experiencing right hip pain. However, the pain resolved to such an extent that Claimant did not seek medical treatment. Notably, in 2010, Claimant had experienced similar right hip pain with prolonged sitting and had been diagnosed with right hip bursitis.

16. In November 2011, Claimant returned to her work activities at Vail Resorts. Claimant testified that upon her return she did not report to her supervisor any injury or continued pain complaints.

17. On December 2, 2011, Claimant presented to Dr. Boch complaining of a sore throat and other respiratory symptoms. The report does not indicate any complaint with regards to her right hip. On December 14, 2011, Claimant returned to her personal physician to address similar upper respiratory symptoms. Again, Claimant did not complain of any right hip issues.

18. On January 23, 2012, Claimant presented to her personal physician complaining of glass in the sole of her right foot. Dr. Bock confirmed, "[N]o other concerns today." The medical documentation does not note any complaints on the part of Claimant with regards to her right hip.

19. At hearing, Claimant testified that she is very in tune with her body, and is always very thorough and truthful when meeting with her physicians regarding current symptoms and complaints. The contemporaneous medical records in December 2011 and January 2012 do not document any right hip complaints. The ALJ concludes that if Claimant were experiencing right hip pain, she more likely than not would have reported it.

20. During the 2011/2012 ski season, Claimant continued to perform her regular work activities without complaint or treatment. It was not until February 24, 2012 that Claimant presented to Dr. Rick Cunningham to address her right hip. Under history of present illness, Dr. Cunningham noted that the Claimant presented, "with two weeks of increasing right buttock pain, groin pain, and lateral sided hip pain." This is consistent with the reports from her personal physician in December 2011 and January 2012 in which Claimant did not report any right hip pain. Accordingly, the ALJ concludes that Claimant began experiencing right hip pain on or about February 10, 2012,two weeks prior to her appointment with Dr. Cunningham.

21. Dr. Cunningham requested that Claimant consult with Dr. Scott Raub. Claimant complained to Dr. Raub, which she did on March 6, 2012. Dr. Raub's notes indicate Claimant had a history of "chronic hip issues for about 15 years." Claimant testified at hearing that while she had been diagnosed with right hip bursitis fifteen years earlier, the condition was not chronic. Claimant complained of right-sided hip pain with right inguinal pain, and right anterior and posterior thigh pain. Claimant conceded to Dr. Raub that she had to purchase a different motorcycle to accommodate her hip problem. This is inconsistent with Claimant's hearing testimony in which she testified she had not been riding her motorcycle. Dr. Raub recommended Claimant undergo an MRI of the right hip and possibly a right hip injection.

22. On March 8, 2012, Claimant underwent a right hip MRI that showed proximal femoral pathology, which the radiologist indicated "predisposes the patient to cam-type femoroacetabular impingement bilaterally." Additionally, the MRI showed a complex tear of the right acetabular labrum most prominently anterosuperiorly. Large field-of-view images demonstrated similar left labral and chondral pathology.

23. On March 15, 2012, Claimant returned to Dr. Raub. Based on the MRI report he diagnosed, "[P]robable systematic femoroacetabular impingement syndrome with labral tearing."

24. Claimant testified that her supervisor made an appointment for her with Dr. Susan Lan at the Vail Valley Medical Center. Dr. Lan referred Claimant to Dr. Brian White, an orthopedic surgeon.

25. On April 18, 2012, Claimant presented to Dr. White. She reported to that following completion of physical therapy after the initial injury, she was able to function reasonably well, but then experienced pain while driving cross-country to Chicago and "really could not walk afterwards." Dr. White's note indicates that "she could not ride her motorcycle and ended up selling it." Claimant's comments to Dr. White are inconsistent with Claimant's hearing testimony. She advised that apart from the one incident from driving to Chicago she was able to perform her regular activities over the summer. Additionally, she testified she continued to ride a motorcycle albeit not as much as in the past. Claimant advised Dr. White that she was "currently living at about 65% of her normal with respect to her activity." However, Claimant testified she was able to complete the entire 2011/2012 ski season. Dr. White assessed, "[T]his is a 51 year old female, who has cam-type femoroacetabular impingement with a labral tear from a collision while skiing. She likely twisted her hip at the time or subluxed it; it is hard to say." Dr. White indicated the need for treatment was related to the workers' compensation injury, and that he would be "happy to advocate for her if she needs."

26. On April 24, 2012, Claimant returned to Dr. Susan Lan. Claimant requested a referral for a second opinion with an orthopedic surgeon in the Vail area. Claimant disclosed to Dr. Lan that 15 years prior she had a diagnosis of bursitis and underwent a steroid injection by Dr. Gotlieb. Thereafter, her bursitis completely resolved and she did not have another issue until the January 2011 event. This is

incorrect. Claimant treated for right hip issues with Dr. Todd Peters in April 2010, less than one year prior to the work injury.

27. On May 21, 2012, Claimant underwent an evaluation with Dr. Philippon, who examined Claimant and reviewed the previous MRI which showed anterolateral labrum tear. He ordered a new MRI which he reviewed that same day. He diagnosed Claimant with "right hip pain secondary to to right hip femeroacetabular impingement, which is predominantly cam, in the setting of mild acetabular dysplasia." He recommended Claimant undergo surgical repair.

28. Dr. Philippon's operative note is dated May 21, 2012, revised May 29, 2012. Claimant underwent surgery, which included right hip arthroscopy with debridement, limited acetabuloplasty, chondroplasty, acetabular labral repair, femoroplasty, iliopsoas fractional lengthening, and capsular plication.

29. Two years later, Claimant filed an Application for Hearing seeking to reopen her workers' compensation claim.

30. Dr. Neil Pitzer performed a Respondent Independent Medical Examination. Dr. Pitzer is board certified in physical medicine and rehabilitation and level II accredited with the Division of Workers' Compensation. Dr. Pitzer has taught at the University of Colorado Health Sciences for the past 20 years. Dr. Pitzer reviewed the medical records and examined Claimant. Dr. Pitzer concluded that Claimant's need for surgery in May 2012 did not relate to the January 15, 2011 work incident. Dr. Pitzer observed that when Claimant was released at maximum medical improvement on February 15, 2011, she was essentially pain free. Dr. Pitzer noted that Claimant returned to work full duty and did not comment on any ongoing hip pain in clinical notes from late 2011 and early 2012. Dr. Pitzer noted that the surgical report revealed right hip degenerative changes, cam-type impingement, acetabular dysplasia, and additional degenerative changes which more likely than not caused the anterior labral tear as opposed to the work incident in 2011. He concluded that the treatment beginning in February 2012 was not for a natural progression the 2011 work injury as Claimant had extensive hip joint pathology on the MRI which related to femoroacetabular impingement and dysplasia which is not related to her contusion.

31. Dr. Pitzer testified at hearing as well. On cross examination, Claimant's counsel asked whether the tearing could have resulted from the trauma in January 2011. Dr. Pitzer noted that Claimant suffered an anterior labral tear, not a posterior labral tear. He credibly and persuasively explained that anterior tears of the labrum are far more likely to occur as a result of degenerative changes to the hip as opposed to trauma. Posterior tears are more often associated with trauma. Additionally, Dr. Pitzer testified that no other physician who had addressed the issue of causation had access to the surgical report, which showed extensive procedures related to correcting Claimant's preexisting and degenerative hip issues. Finally, Dr. Pitzer noted that studies have shown that women in their late 40's and early 50's with cam-impingement, as the MRI demonstrated here, often develop anterior labral tears.

32. The ALJ finds the Dr. Pitzer's opinions on the issue of relatedness to be more credible and persuasive than those expressed by other medical treatment providers.

33. Based on the totality of the evidence, the ALJ finds it more likely than not that Claimant sustained an industrial injury in January 2011 when she was struck by a skier and fell onto her left side. Claimant underwent physical therapy and returned to baseline. Further, the ALJ finds that Claimant presented to her personal physician in late 2011 and early 2012 and did not report any right hip issues. Claimant is very in tune with her body, as Claimant testified, and had she been experiencing right hip issues, the ALJ finds it is more likely than not that she would have reported those issues to her personal physician.

34. Approximately one year after the work incident Claimant began experiencing right hip issues again. During the course of that year Claimant performed her regular full-duty, unrestricted work activities. Over the summer, she performed numerous recreational activities including motorcycle riding, spin classes, yoga, and some softball.

35. The ALJ finds, based on the totality of the evidence, that Claimant has failed to establish by a preponderance of the evidence that her need for right hip treatment beginning in February 2012 is related to the work incident which resulted in Claimant being struck on her left side and falling onto her left hip. Rather, the ALJ finds that Claimant's need for right hip treatment beginning in February 2012 is the natural progression of her underlying preexisting right hip degenerative condition.

CONCLUSIONS OF LAW

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

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

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

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

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

Pursuant to Section 8-43-303(1), C.R.S., a claim may be reopened based on a change of condition which occurs after MMI. *See El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to section 8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985).

Here, Claimant failed to prove by a preponderance of the evidence that her need for treatment after February 2011 related to her January 15, 2011 work incident. The medical evidence does not support Claimant's assertion that she sustained a right hip labral tear in January 2011. Rather, the medical evidence supports a conclusion that the right hip labral tear and need for surgery resulted from Claimant's degenerative hip condition, which was neither caused nor aggravated by the work incident. Consequently, the petition to reopen must be denied.

ORDER

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

IT IS THEREFORE ORDERED that Claimant's claim to reopen is denied and dismissed.

DATED: September 18, 2015

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

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 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. (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.*

ISSUES

- Did Claimant establish by a preponderance of the evidence that his claim should be reopened?
- Is Claimant entitled to additional permanent partial disability benefits?

PROCEDURAL STATUS

This case initially proceeded to hearing before ALJ Cain on March 11, 2015. Claimant was not present for that hearing, however, medical records were submitted. ALJ Cain held the matter in abeyance while the parties tried to reach a full and final settlement. Those settlement negotiations were unsuccessful. The undersigned ALJ reviewed the recording of the March 11, 2915 hearing.

Claimant then filed a new Application for Hearing dated May 2, 2015, listing as issues permanent partial disability benefits and petition to reopen.

On July 9, 2015, Respondents filed a Motion to Strike Hearing and Dismiss Issues with Prejudice. Respondents alleged that following the March 11, 2015 hearing, the parties had a tentative agreement to settle the claim and inasmuch as ALJ Cain retained jurisdiction to address the permanent partial disability issue that the hearing scheduled for July 28, 2015 should be vacated. Respondents also argued Claimant filed a timely Opposition to the Motion to Strike.

In an Order dated July 22, 2015, ALJ Cain denied Respondents' Motion to Strike Hearing and Dismiss Issues with Prejudice. In that Order, ALJ Cain concluded that the ALJ conducting the hearing set for July 28, 2015 would have jurisdiction to adjudicate the PPD issue. The undersigned ALJ concludes that he has jurisdiction to address the issues identified in Claimant's Application for Hearing, including the extent of Claimant's PPD and Claimant's Petition to reopen his claim.

Following the July 28, 2015 hearing, Claimant submitted a voluminous set of medical records concurrently with his Position Statement. Respondent objected to said exhibits. The ALJ has considered and sustains the Objection. Although the medical records in question appear to have previously been exchanged, these were not offered, nor admitted at hearing. Attachments to briefs are not considered evidence unless properly admitted at hearing or by order of an ALJ. *See Subsequent Injury Fund v. Gallegos,* 746 P.2d 71 (Colo. App. 1987). The obvious purposes of this rule are to protect the parties' right to know the evidence that will be considered, and to afford them a fair opportunity to present their own case and rebut adverse evidence. *See Hendricks v. Industrial Claim Appeals Office,* 809 P.2d 1076 (Colo. App. 1990). Since the records

submitted with Claimant's Position Statement were not admitted at hearing, these will not be considered as on the issues set for determination.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on March 27, 2012 while he was working as a maintenance worker for Respondent-Employer. He was pulling a lawnmower back onto a trailer, which caused his right knee to buckle. He continued to work, but the pain persisted.

2. On April 10, 2012, Claimant was examined by Thanh Chau, PA-C and Hiep Ritzer, M.D. at Heath-ONE who diagnosed right knee sprain. The initial x-rays taken of the knee were negative for any bony abnormality, however, pain and stiffness were noted when Claimant extended and flexed his knee. Prior knee injuries were denied. Dr. Ritzer was concerned about a meniscal injury, recommended a MRI scan as well as prescribing a knee brace and ibuprofen

3. A MRI of the right knee was performed on April 11, 2012, which showed an anterior cruciate ligament tear, along with bone contusions along the sulcus terminalis and postolateral tibial plateau. A radial tear of the lateral meniscus body was also noted.

4. Claimant was next seen by Dr. Ritzer on April 17, 2012, who diagnosed an ACL tear and lateral meniscus tear. Dr. Ritzer referred Claimant for an orthopedic evaluation.

5. Claimant was examined by Derek Johnson, M.D. on April 24, 2012 who diagnosed right knee sprain/strain, ACL tear and lateral meniscus tear. He noted Claimant was a candidate for arthroscopic surgery and ordered a knee brace.

6. Claimant was seen in follow-up by PA Chau and Dr. Ritzer on May 1, 2012 and it was noted that he was working modified duty. A request for authorization of the surgery was pending.

7. Claimant underwent surgery on June 15, 2012, which was performed by Dr. Johnson. The procedure performed was right knee arthroscopic ACL reconstruction and lateral meniscectomy.

8. Claimant returned to Dr. Johnson on June 21, 2012 and ACL rehabilitation protocol was begun. He saw PA Chau on June 27, 2012 and physical therapy was begun.

9. Dr. Ritzer and PA Chau examined Claimant on June 27, 2012 (12 days post-surgery). Claimant was still taking narcotic pain medication and some swelling was noted. Mr. Julin was to start physical therapy.

10. Claimant returned to PA Chau and Dr. Ritzer on July 13, 2012 and reported that he was feeling better, although he had pain on the lateral side of his knee. No swelling or effusion was noted and he was to continue with physical therapy. His next appointment at HealthONE was July 30, 2012 at which time Claimant reported his knee pain was worsening. He was scheduled to see Dr. Johnson in follow-up in approximately two weeks.

11. Claimant was next seen on August 20, 2012. At that time he reported his knee felt about the same, with his pain worsened by prolonged standing. He was to continue physical therapy and discontinue NSAIDs. Tramadol was prescribed, along with a Pennsaid solution.

12. Claimant was evaluated by Dr. Ritzer and PA Chau on September 10, 2012 at which time some improvement in his pain was noted. No swelling, effusion or infection was seen. There was a small palpable nodule noted at the medial proximal tibia. He was to continue his physical therapy and referred to radiology to evaluate the nodule.

13. Dr. Ritzer examined Claimant on October 1, 2012, at which time he reported no improvement in the knee. Some weakness was noted against resisted knee flexion and extension. A new knee brace was provided and it was noted that he was scheduled for follow-up with Dr. Johnson.

14. Claimant was examined by Dr. Johnson on October 16, 2012 at which time he reported continued pain. The medical records document that Claimant received physical therapy over 9 months (a total of 43 sessions) from June 29, 2012 through October 19, 2012. However, he continued to experience pain in his right knee. Dr. Johnson referred Claimant to his partner Dr. Oster for second opinion.

15. Claimant was next seen by Dr. Ritzer on October 22, 2012 with continued pain complaints. Dr. Ritzer ordered a repeat MRI, which was done on October 26, 2012. The MRI showed that the ACL graft was intact and there was no new meniscal tear. Resolved lateral meniscal compartment pivotal shift, bone bruising and small joint effusion were noted

16. Claimant was evaluated by Dr. Ritzer on October 30, 2012 at which time he referred Mr. Julin to a physiatrist, Dr. Wakeshima. Dr. Wakshima examined Claimant on November 15, 2012 and diagnosed persistent knee pain. Claimant's medications were changed and a TENS unit was prescribed.

17. Claimant was examined by Michael Hewitt, M.D. on November 16, 2012 and was experiencing medial and lateral joint line tenderness. A new tear in the lateral meniscus was noted, which was confirmed by contacting the radiologist who originally read his MRI. Dr. Hewitt saw Claimant for a follow-up on December 5, 2012 and he wanted to proceed with surgery.

18. Dr. Hewitt performed a right knee arthroscopic meniscetomy on January 9, 2013. The post-operative diagnosis was history of anterior cruciate ligament

reconstruction with intact graft; lateral meniscal tear, mid zone; localized grade 3 chondromalacia; suprapatellar and anterior notch synovitis.

19. Claimant received post-surgery follow-up care from Drs. Ritzer and Wakshima. On January 21, 2013, Dr. Wakeshima noted patient to be improving after surgery. No sign of infection was noted, although Claimant reported pain at the medical and lateral joint line region.

20. On January 30, 2013, Dr. Wakeshima evaluated Claimant, who reported that he still had ongoing right new pain. On examination, mild tenderness about the right anterior, medial and lateral knee region was noted. Dr. Wakeshima noted that he continued to progress with physical therapy. Dr. Wakeshima informed Claimant that he could wean himself off opioids and continue with the use of his TENS unit.

21. Dr. Wakeshima next examined Mr. Gerson on Febraury 21, 2013, who continued to have medical knee region pain about the pes anserine region. There was no swelling, crepitus or erythema noted in the right knee. A flector patch was refilled for Mr. Julin and he was to continue with his TENS unit and physical therapy.

22. Claimant was examined by Dr. Wakeshima on March 12, 2013. Very mild tenderness was noted in his right knee about the right pes anserine insertion. There was no lateral or medial joint line tenderness noted. Dr. Wakeshima opined that Claimant was approaching MMI, provided there was not further surgical intervention. He was given a re-fill for the Flector patch and Pennsaid drops.

23. Claimant next saw Dr. Wakeshima on June 5, 2013 and reported worsening pain since he returned to work. Mild tenderness to palpation was noted about the right anterolateral knee joint region. He was scheduled to have his hardware removed by Dr. Hewitt and Dr. Wakeshima wanted to wait for this to be done before his knee brace was modified or a new brace was ordered.

24. Dr. Wakeshima examined Claimant on June 20, 2013 and it was noted that his hardware was removed June 12, 2013. Tenderness was greater at the lateral as opposed to medial joint line. Dr. Hewitt had begun Claimant on physical therapy and Mr. Julin was going to bring in his knee braces at the next appointment.

25. Claimant returned to Dr. Wakeshima on August 14, 2013 and reported that the injection in his right medical knee region helped with some of his symptoms. Tenderness to palpation was noted about the insertion of the pes anserine. Dr. Wakeshima's impression was pes anserine tendinitis and he discussed that Claimant was approaching MMI. A prescription for compounded meloxicam/prilocaine/lidocaine cream was written.

26. On August 28, 2013, Dr. Wakeshima examined Claimant who reported that he reinjured his knee while jogging. Claimant had pain and could not fully extend his knee. A MRI was performed on August 23, 2013 and a copy of the report was going to be requested. Dr. Wakeshima recommended that Mr. Julin continue to use the hinged knee brace.

27. Dr. Wakeshima evaluated Claimant on September 13, 2013, with tenderness to palpation was noted about the pes anserine insertion and medial lower portion of his knee joint region. Surgery was not being contemplated Claimant and it was felt that Claimant was approaching MMI.

28. Claimant returned to see Dr. Ritzer on October 3, 2013. At that time, Dr. Ritzer concluded that Claimant had reached MMI. Dr. Ritzer also provided Claimant with an overall impairment of 28% to his right knee. Included in the impairment rating was a 10% impairment rating for the lateral meniscus tear and a 10% impairment rating for this ACL reconstruction. Dr. Ritzer specifically did not provide Claimant with an impairment rating because of the presence of his chondromalacia.

29. Respondents filed a Final Admission of Liability ("FAL") that is undated. Respondents admitted to the 28% impairment rating given by Dr. Ritzer. Claimant filed a timely objection to the FAL and requested a DIME.

30. Dr. Albert Hattem was selected as the DIME physician. Dr. Hattem, in a report dated May 14, 2014, concluded that Claimant was entitled to a 31% impairment rating to Claimant's lower extremity. Dr. Hattem included a 5% lower extremity impairment in the Claimant's medical impairment rating for the presence of chondromalacia.

31. Claimant testified at hearing that he was asking for further medical treatment. Specifically, he referenced a strengthening program as documented in Dr. Hewitt's 9/11/203 report.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

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

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to

find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The two issues before the ALJ are addressed below.

Reopening

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Claimant submitted a copy of the Final Admission of Liability, including the discharge summary and impairment rating and issued by Dr. Ritzer [Exhibit 1]. Claimant also adduced copies of Dr. Hewitt's 9/6/13 and 9/11/13 reports, along with the 9/30/13 and 10/2/13 records from Rocky Mountain Spine and Sport at the hearing [Exhibit 2]. Most of Claimant's testimony at hearing centered on his request for additional medical treatment, as identified in the aforementioned records.

Respondents contended that there was insufficient evidence to support a Petition to Reopen and the ALJ is persuaded by this argument. First, there is no evidence which documents a worsening of claimant's condition, including any medical records from his authorized treating physicians. In addition, Claimant did not testify that his right knee had worsened, nor did he return to any of his authorized treating physicians and report a worsening of condition.

Second, even assuming *arguendo*, that Claimant's request for medical benefits is subsumed within the Petition to Reopen, there has been no showing that Claimant was denied medical benefits, including any treatment. Based upon the evidence before the ALJ, claimant has the right to maintenance medical benefits, as outlined in Dr. Ritzer's 10/3/13 report.

Permanent Partial Disability

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); *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012).

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is Denied.

2. Claimant's request for additional PPD benefits is denied and dismissed.

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

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

DATED: August 28, 2015

s/Timothy L. Nemechek
Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The primary issue presented for determination is whether the Claimant's claim should be reopened based upon a mistake of fact. Specifically Claimant alleges that his average weekly wage (AWW) was calculated incorrectly due to an error in the date of injury, and that he is therefore owed more indemnity benefits. Claimant also alleges other mistakes the nature of which Claimant did not make very clear. Claimant alleges that Respondents should be penalized for various violations of the Workers' Compensation Act. Respondents assert that Claimant failed to properly plead his penalty allegations.

During the hearing, the Claimant attempted to allege a change of medical condition as a basis for reopening his claim. Respondents objected because Claimant did not previously identify a change of condition as a basis for reopening in the discovery responses he provided to the Respondents. The ALJ sustained the objection and did not permit the Claimant to proceed on worsening of condition.

FINDINGS OF FACT

1. The Claimant sustained an injury on December 27, 2011.

2. The Respondents admitted liability for Claimant's injury and he received medical treatment until he was placed at maximum medical improvement (MMI) on September 27, 2012.

3. Initially, Respondents filed a General Admission of Liability admitting for an AWW of $400.00.

4. The Claimant was represented by counsel in early 2012. On March 23, 2012, Claimant's attorney wrote a letter to the Insurer and stated, "The wage information that I have indicates that [Claimant's] average weekly wage was $513.99 per week."

5. On the Final Admission of Liability filed on July 18, 2013, the Respondents admitted for an AWW of $513.99, and a temporary partial disability (TPD) total of $9,069.58.

6. The Final Admission of Liability also indicated an overpayment of TPD in the amount of $1,241.07.

7. The claim closed based on the July 18, 2013 Final Admission because Claimant failed to timely object.

8. Claimant seeks a reopening of his claim citing various reasons. Claimant never filed a petition to reopen with the DOWC, but did file an application for hearing endorsing "petition to reopen."

9. The Claimant now asserts that his AWW was calculated incorrectly merely because an incorrect date of injury appears on the Employer's First Report of Injury. He asserts that because a claimant's AWW should be calculated based on his wages "at the time of the injury" that somehow his wages were incorrectly calculated. Claimant offered no persuasive evidence as to what he believes his AWW should be. In light of the fact that his attorney agreed to an AWW on March 23, 2012, and because Claimant failed to timely object to the Final Admission filed on July 19, 2013, the ALJ finds no basis to disturb the AWW in this case.

10. The Claimant also asserts that his TPD payments were inaccurate. Again, Claimant failed to timely object to the Final Admission of Liability filed on July 19, 2013, and he has offered no persuasive argument that any mistake has occurred that would justify reopening his claim as it pertains to the TPD payments. Further, based on the evidence presented, the ALJ can discern no mistake in the TPD payments made to the Claimant.

11. Prior to the July 18, 2013 Final Admission, the Claimant underwent a Division Independent Medical Examination with Dr. Justin Green on May 22, 2013.

12. As required by the Workers' Compensation Act, on May 7 2013, the Respondents sent Claimant's medical records to Dr. Green and to Claimant's counsel.

13. There is no evidence that Claimant's counsel made any attempt to supplement the medical records for the DIME. Apparently, Respondents did not include a record from William Beaver, M.A., in the DIME medical record packet, which Claimant now asserts should subject Respondents to a penalty.

14. Claimant provided no evidence as to how the missing record had any impact on Dr. Green's findings and conclusions. In fact, the Claimant did not offer Mr. Beaver's report into evidence.

15. Claimant essentially testified that Respondents should now be penalized for his attorney's mistake in failing to supplement the records provided to Dr. Green.

16. Claimant testified that he did not receive information about his rights when he initially injured himself and that his lack of notice concerning his rights in early 2012 which he believes impacted the processing of his claim. Claimant did not explain how this situation impacted his claim.

17. Claimant's application for hearing cites various allegations of penalties against Respondents including reporting an inaccurate date of injury on the First Report of Injury; timeliness of compensation payments; accuracy of compensation payments; average weekly wages; final admission of liability; no posting of insurance carrier at the employer's location; no rule 5 survey completed by the Claimant. Most of these allegations are not described with any level of specificity, and are insufficiently plead.

18. Further, the Claimant presented no persuasive or credible evidence to support his penalty claims, many of which he knew or should have known about more than one year prior to filing his application for hearing on February 19, 2015.

CONCLUSIONS OF LAW

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

General Provisions

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).

Reopening

4. Section 8-43-303(1), C.R.S., provides:

> At any time within six years after the date of injury, the director or an administrative law judge may … review and

> reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

5. During the hearing, the ALJ mistakenly stated that under WCRP, Rule 7, the Claimant must file a petition to reopen with the Division before proceeding to a hearing on reopening. However, §8-43-303, C.R.S., does not mandate the filing of a formal petition to reopen in order to confer jurisdiction on an ALJ to determine whether, in fact, a claim should be reopened. *Ward v. Azotea Contractors*, 748 P.2d 338; *Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). As such, the ALJ has authority to determine whether the Claimant's claim should be reopened.

6. When a party seeks to reopen based on mistake, the ALJ must engage in a two-step process. The ALJ must determine "whether a mistake was made, and if so, whether It is the type of mistake which justifies reopening" the claim. *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981).

7. The Claimant has failed to show that there is a mistake or error which justifies reopening his claims. In reviewing the evidence presented, there may have been some clerical errors but the ALJ can find no mistake which would not have been apparent to Claimant or his attorney when this claim was still opened. For instance, Claimant's attorney could have agreed to a different AWW, but he did not. He agreed to an amount that Claimant now disputes more than three years after the alleged mistake was made. In addition, the issue involving any inaccuracies in TPD payments should have been addressed before this claim closed. The allegation that the DIME medical packet was incomplete could have been rectified by Claimant's attorney at that time. The types of mistakes, if any, to which Claimant cites, are not the types of mistakes that justify reopening this claim.

Penalties

8. The Claimant did not properly plead his penalty allegations. In any application for hearing for penalties, the applicant shall state with specificity the grounds on which the penalty is being asserted. Section 8-43-304(4), C.R.S. As found, Claimant did not state with specificity in his Application for Hearing filed on February 19, 2015 the basis for all of the penalty claims. In addition, a request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5), C.R.S. *See* also *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002). Many of the allegations made by Claimant were or should have been known to him more than one year before February 19, 2015. For instance, Claimant alleged that the Employer failed to post the name of its workers' compensation insurance carrier in its restaurants, an allegation which should have been known to him well in advance of February 2015. The ALJ makes the same conclusions regarding allegations of inaccurate AWW calculations, inaccurate

TPD payments, timeliness of TPD payments and the WCRP Rule 5 survey. All of these alleged violations of the Workers' Compensation Act occurred approximately three years ago and Claimant produced no credible evidence that these alleged violations were not known to him until February 19, 2014.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his workers' compensation claim is denied.

2. Claimant's claim for penalties against Respondents is denied.

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

DATED: September 8, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Is Claimant entitled to *Grover* medical benefits?
- Was the treatment provided by Dr. Noonan reasonable, necessary and related to the admitted industrial injury?

PROCEDURAL ISSUE

One of the medical bills in question [Exhibit 8-Bates no. 31-date of service 5/6/15] was incurred after Claimant's Application for Hearing was filed. However, Respondent agreed that the issue of whether this treatment was part of Claimant's claim for *Grover* medical benefits and whether it was reasonable, necessary and related could be adjudicated at the this hearing.

FINDINGS OF FACT

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

1. Claimant has been employed as a firefighter for twenty-one (21) years. Claimant suffered an admitted industrial injury on September 25, 2012 while he was moving a fire hose as part of a training exercise. An Employer's First Report of Injury was filed on September 25, 2012.

2. Prior to this, Claimant injured his shoulder in 2009 while weightlifting. He testified that he did not lose time from work for this injury. Claimant testified that he did not require treatment for his shoulder prior to the 2012 injury. He was not diagnosed with arthritis prior to 9/25/12 and was not aware he had arthritis.

3. Claimant was examined by Benjamin Clower, M.D. on September 27, 2012, who noted that Claimant had intermittent pain, with decreased range of motion since suffering an injury in 2009. Dr. Clower's assessment was work-related right shoulder injury. Dr. Clower suspected a possible SLAP injury and referred Claimant for an MRI.

4. An MRI was done on Claimant's right shoulder on September 27, 2012, which showed advanced degenerative arthrosis in the glenohumeral joint, including a large marginal osteophyte; rotator cuff tendinopathy, but no frank tear; tight rotator cuff outlet due to multifactorial causes. Claimant testified that he understood the MRI showed arthritis in his right shoulder.

5. Dr. Clower saw Claimant in follow-up on October 9, 2012 noting that the MRI showed no labral tear, but a mild rotator cuff tear.

6. Claimant was evaluated by Thomas J. Noonan, M.D. on October 16, 2012. Dr. Noonan's impression was right shoulder pain, right shoulder advanced glenohumeral arthrosis. Dr. Noonan discussed treatment options, including a "watch and wait" conservative approach versus physical therapy versus occasional cortisone injections. A surgical procedure (arthroscopy) was also discussed. This procedure included joint debridement, capsular release, manipulation under anesthesia, subacromial decompression and possible biceps release.

7. Claimant was also examined by Dr. Clower on October 16, 2012. At that time, Dr. Clower's assessment was work-related right shoulder pain, secondary to glenohumeral arthritis. Approval for a second opinion by Thomas, Mann, M.D. at Cornerstone Orthopedics was obtained. Dr. Clower recommended that Claimant begin physical therapy while awaiting the second opinion.

8. Dr. Mann examined the Claimant on October 22, 2012. Dr. Mann's assessment was right shoulder pain with significant glenohumeral arthropathy and marginal osteophytes. Dr. Mann discussed treatment options from conservative treatment with therapy and activity modification as well as injection therapy, both cortisone and viscosupplementation versus arthroscopic debridement, humeral head resurfacing and total shoulder hemiarthroplasty. Dr. Mann noted there were significant mechanical issues in the shoulder that made Claimant a good candidate for arthroscopic debridement and removal of osteophytes. These issues were causing limitations in the shoulder.

9. On November 14, 2012, Claimant underwent a right shoulder arthroscopy, which was performed by Dr. Noonan. The procedures included arthroscopic debridement of humeral head spurring, removable of loose bodies, biceps release, subacromial decompression, capsular release, as well as manipulation under anesthesia.

10. Claimant testified that he returned to full duty after the surgery. He has continued to work full-time for Respondent-Employer.

11. Claimant was evaluated by William Miller, M.D. on July 19, 2013, at which time he was placed at maximum medical improvement. Dr. Miller assigned a 17% upper extremity permanent medical impairment. He also wrote a referral for massage therapy for twelve times over the next year, modalities as indicated. He also recommended two (2) follow-up visits at Exempla.

12. Respondent filed a Final Admission of Liability on August 28, 2013, admitting for the impairment rating of Dr. Miller. The Respondent's position on maintenance medical benefits after MMI stated: "admit" however, the FAL also noted "any and all benefits not admitted are hereby specifically denied".

13. Claimant testified he experienced a flare-up of his symptoms in the right shoulder, which he stated occurred approximately every six (6) months.

14. Claimant returned to Dr. Noonan's office on March 27, 2014 and was evaluated by Gary Sakryd, PA-C and Dr. Noonan. The chief complaint was listed as a new onset of mild right shoulder pain, as well as a new onset of numbness. The report [Exhibit 8] noted that Claimant was counseled that he had chondral changes globally throughout the glenohumeral joint and that he may need future intervention down the line. They also talked about cortisone injection to "calm his shoulder down". Claimant was going to consider an injection. Respondent paid for the March 27th evaluation.

15. Claimant returned to Dr. Noonan's office on November 6, 2014 complaining of right shoulder pain and numbness. Dr. Noonan's impression was right shoulder pain and a flare of existing glenohumeral arthritis. Dr. Noonan injected Claimant's right shoulder glenohumeral joint with 1cc of Kenalog and 4cc of lidocaine.

16. Claimant returned to Dr. Noonan's office on May 6, 2015. Dr. Noonan felt it was reasonable to repeat the cortisone for him and he received another injection at that time.

17. Claimant testified that the injections relieved his symptoms.

18. Respondents disputed whether the treatment received by Claimant on November 6, 2014 and May 6, 2015 was a result of the industrial injury or whether the treatment was necessitated by Claimant's pre-existing osteoarthritis.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1).

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

A Respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the

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

In cases where the Respondent files a Final Admission of Liability admitting for ongoing medical benefits after MMI, it retains the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 7 P.3d 863 (Colo. App. 2003). When the Respondent challenges the Claimant's request for specific medical treatment the Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the Claimant proved that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). In this case, the issue is whether Claimant satisfied his burden of proof with regard to the injections given by Dr. Noonan; more particularly whether this is properly considered post-MMI medical treatment under *Grover* and its progeny, as well as whether the treatment provided was reasonable and necessary.

Liability for Injections to Claimant's Right Shoulder

In that case at bench, Claimant has the burden of proving his entitlement to *Grover* medical benefits, along with the reasonableness and necessity of these treatments. More particularly, Claimant was required to establish that his need for the injections was caused by the 2012 injury and required to maintain MMI. Respondent has disputed whether the injections Claimant received were necessitated by the industrial injury as opposed to his pre-existing osteoarthritis. As a starting point, Claimant's admitted industrial injury on September 25, 2012 was a traumatic injury which caused him to experience symptoms in his right shoulder. The right shoulder had extensive arthritic changes in the glenohumeral joint, which most probably were present prior to the injury in 2012. Indeed, Claimant experienced symptoms in 2009 in the same shoulder and experienced intermittent symptoms afterward. Dr. Clower's records documented this fact.

However, there was no evidence that the osteoarthritis in Claimant's right shoulder limited him in any way before September of 2012, including performing his work duties. Claimant testified credibly that he did not require treatment for the arthritic changes in the right shoulder prior to the 2012 injury. Claimant contended that the 9/25/12 injury caused the pre-existing degenerative changes to become symptomatic and require treatment, including his surgery. This is supported by the medical records. Dr. Clower characterized Claimant's shoulder condition as exacerbation of glenohumeral arthritis and the surgery was necessary to alleviate the symptoms brought on by this exacerbation. The record established that Claimant's pre-MMI treatment for

his shoulder was necessary to cure and relieve the effects of the 2012 work injury. Thus, the ALJ concludes that since the 2012 injury directly led to Claimant's need for treatment, Respondent continues to be liable for treatment to maintain MMI.

Turning next to whether the modality of treatment (injections) was reasonable, both Dr. Mann and Dr. Noonan identified injections as a recommended course of treatment following the industrial injury. The ALJ notes that one of the treatment alternatives by Dr. Noonan was a cortisone injection. (Finding of Fact No. 6). Dr. Mann also identified this as a therapeutic option for Claimant. (Finding of Fact No. 8). However, Claimant chose to undergo surgery. The medical records admitted at hearing established that injections were a reasonable modality of treatment for Claimant's condition. No contrary evidence was received by the ALJ, who concludes that this form of treatment was reasonable.

There was no dispute that Claimant required treatment after MMI to maintain his condition, however, the question raised by Respondent was whether the injections constituted treatment that was necessary to maintain MMI. After Claimant reached MMI on July 19, 2013, Dr. Miller recommended that he continue to receive treatment, including physical therapy and follow-up visits at Exempla. Dr. Miller specifically identified this treatment as maintenance care Claimant required. An inference that is drawn from Dr. Noonan's records and Claimant's testimony is that the injections were required to maintain Claimant's condition following the surgery. Both the medical records and Claimant's testimony documented an improvement in Claimant's symptoms and function after he received the injections. The recommendation for an injection made by Dr. Noonan was within the one year time frame (after MMI), as specified by Dr. Miller.

There also was no dispute that through its FAL, Respondent admitted for maintenance medical benefits, although this admission did not specifically admit for the injection therapy provided by Dr. Noonan. Given that Claimant required maintenance treatment, Respondent admitted for said treatment, the treatment was recommended by authorized treating physicians and the treatment improved Claimant's symptoms; all lead to the conclusion that the injections were necessary under these circumstances. Therefore, the ALJ concludes that Claimant met his burden of proving that the injection therapy was necessary to relieve his symptoms, as well as to maintain MMI.

The record also established that Dr. Noonan was an authorized treating physician and was a treatment provider throughout the pendency of the claim. Dr. Noonan recommended a cortisone injection at the time of the March 27, 2014 visit. In his recommendation, Dr. Noonan opined that an injection was a reasonable treatment option and the medical records indicated that Claimant wanted time to think about it. Respondent paid for this post-MMI evaluation. As the treating surgeon, Dr. Noonan was in a position to evaluate and make recommendations regarding Claimant's need for post-MMI treatment. The evidence before the ALJ indicates that Dr. Noonan felt this treatment was reasonable and necessary. No medical opinion contradicted Dr. Noonan's conclusion. Therefore, the ALJ concludes that Claimant has proven that the injections were part of the treatment Claimant required as part of his post-MMI care.

This treatment was part of what was admitted in the FAL and included within Claimant's right to receive *Grover* medical benefits.

In coming to this conclusion, the ALJ has considered Respondent's contention that Claimant had osteoarthritis in the glenohumeral joint prior to the 2012 injury and this condition required the treatment at-issue. There was no dispute that arthritic changes were present in the glenohumeral joint and was borne out by the medical records, including the MRI scan of September 27, 2012. However, there is no medical evidence before the ALJ which documented that Claimant would have required the injections absent his industrial injury. Stated another way, there was no medical opinion which established the injections Claimant received were because of his pre-existing osteoarthritis, as opposed to his work injury.

The medical evidence demonstrated that the Claimant required treatment only after his industrial injury in 2012. This included, first, the surgery and second, the treatment which followed this procedure. The inference drawn from Dr. Noonan's records is that he considered this to be a consequence of the injury and reasonable in light of the flare up of Claimant's symptoms. Because Claimant needed this treatment as a result of the industrial injury, the injections were reasonable and necessary. The ALJ concludes that the treatment provided by Dr. Noonan was part of the sequelae from Claimant's industrial injury and required to maintain MMI. Respondent is therefore liable for said treatment.

ORDER

It is therefore ordered that:

1. Respondent shall pay for Claimant's injections provided by Dr. Noonan on November 6, 2014 and May 6, 2015, pursuant to the Worker's Compensation Fee Schedule.

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

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

DATED: September 8, 2015

s/Timothy L. Nemechek

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the L3-L5 fusion surgery performed by Chad Prusmack, M.D. on April 10, 2015 was reasonable, necessary and causally related to her November 12, 2012 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant is a 69 year old female who worked for Employer as a Financial Advisor for nursing students at the University of Phoenix. On November 12, 2012 Claimant suffered admitted industrial injuries as a result of a motor vehicle accident. In addition to other conditions, Claimant injured her lower back.

2. On November 16, 2012 Claimant underwent an x-ray of her lumbar spine. The x-ray reflected a minimal grade 1 anterolisthesis at L4-L5. There was also mild facet arthropathy and mild age-related spondylosis. The x-ray revealed degenerative changes but no evidence of a traumatic injury to Claimant's lumbar spine.

3. Claimant received conservative treatment for her injuries through Authorized Treating Physician (ATP) Darrell Quick, M.D. She obtained physical therapy, participated in a home exercise program and received injections. Claimant also underwent a lumbar spine MRI.

4. On June 28, 2013 Dr. Quick determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned Claimant a 30% whole person impairment rating for the physical and psychiatric aspects of her injuries. Dr. Quick noted that Claimant required medical maintenance treatment.

5. Because Claimant continued to experience lower back symptoms, Dr. Quick referred her for a neurological consultation with Bernard H. Guiott, M.D. Dr. Quick specifically referred Claimant to determine whether she was a candidate for a lumbar discectomy.

6. On March 5, 2014 Claimant visited Dr. Guiot for an examination. Claimant stated that her back pain was increasing in intensity and was limiting her daily activities. Dr. Guiot remarked that he reviewed Claimant's February 26, 2014 MRI. The MRI confirmed disc-based injuries at L3-L4 and L4-L5. Specifically, there was evidence of significant stenosis producing compression of the traversing L5 nerve root. Dr. Guiot's impressions were lumbar radiculopathy and lower back pain. He concluded that the site of Claimant's pain generator was localized to the L3-L4 and L4-L5 levels. Dr. Guiot recommended a two level TLIF fusion.

7. Dr. Quick also referred Claimant for a neurological consultation with Chad Prusmack, M.D. On April 1, 2014 Claimant underwent an evaluation with Dr. Prusmack. Claimant reported ongoing lower back pain and radiating pain around the right hip area and right medial thigh. On examination, Claimant exhibited worsening back pain on flexion and extension as well as a chronic baseline of axial back pain. Dr. Prusmack recommended a discography to determine whether the L4-L5 level was Claimant's pain generator.

8. On May 12, 2014 Claimant visited Dr. Prusmack for an evaluation. Dr. Prusmack noted that the discogram revealed a positive concordant pain response with a grade 4 annular tear at L5-S1 in the absence of any other positive concordant pain responses. He remarked that Claimant had significant right-sided anterior thigh pain and a right-sided L3-L4 far lateral disc protrusion. Dr. Prusmack recommended an L5-S1 minimally invasive TLIF.

9. On May 27, 2014 Brian Reiss, M.D. performed a records review of Claimant's case. He noted that Claimant had a history of prior recurrent lower back pain. Dr. Reiss remarked that Claimant's lower back pain had improved considerably and resolved with treatment. He commented that imaging studies revealed multiple levels of degenerative changes from L2-S1 and that all of the discs could be pain generators. Dr. Reiss thus concluded that the recurrence of Claimant's lower back pain was the natural course of her pre-existing condition.

10. On May 28, 2014 Dr. Prusmack recommended an L5-S1 fusion. He also recommended a right disc compression at L3 and possibly L4.

11. On July 21, 2014 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. After conducting a physical examination he diagnosed right-sided L3-L4 disc herniation, right-sided L4-L5 disc herniation and degenerative changes, and a concordant disc protrusion at L5-S1. Dr. Rauzzino recommended a L3-L4 microdiscectomy. However, he remarked that, if Claimant underwent an L5-S1 fusion, there was a reasonable chance that Claimant would ultimately require a three level fusion.

12. In a July 29, 2014 note Dr. Rauzzino recommended a right L3-L4 microdiscectomy to treat Claimant's right leg pain. He hoped to avoid any fusion because of her severe disc disease at L3-L4. Dr. Rauzzino specified that, if Claimant underwent an L5-S1 fusion, there is a "reasonable chance that she would end up with a three-level fusion."

13. On August 13, 2014 Claimant returned to Dr. Guiot for an examination. He noted that, based on the discogram, the L5-S1 disc space was Claimant's pain generator. Dr. Guiot determined that Claimant would benefit from an L5-S1 interbody fusion and stabilization. He noted that decompression at the "degenerated" L3-L4 and L4-L5 sites "adjacent to instrumental fusions is not optimal." However, if the L3-L4 and L4-L5 segments were contributing to Claimant's pain, an interbody fusion from L3-S1 would be necessary.

14. On August 20, 2014 Claimant underwent an independent medical examination with Brian Reiss, M.D. Relying on the *Colorado Workers' Compensation Medical Treatment Guidelines* (*Guidelines*) Dr. Reiss noted that a pain generator must be clearly identified before proceeding with surgical intervention. However, Claimant's pain generator had not been clearly identified. Moreover, the *Guidelines* also reflect that a fusion should be limited to two or fewer levels. Finally, Dr. Reiss commented that Claimant's MRI revealed abnormalities at the L3-S1 levels. He diagnosed Claimant with degenerative disc disease and back pain. Dr. Reiss thus concluded that the surgeries requested by doctors Guiott and Prusmack were not warranted.

15. Respondents subsequently approved a L3-L4 decompression. On November 20, 2014 Claimant underwent a L3-L4 decompression of the nerve root with resection of a L3-L4 far lateral herniated disc.

16. On April 7, 2015 Claimant was admitted to SkyRidge Medical Center for an increase in lower back pain. Claimant stated that her lower back pain and radiculopathy improved following her L3-L4 decompression, but after bending over in an uncertain position she experienced a recurrence of symptoms. The impressions were acute on chronic intractable back pain with a history of degenerative joint disease and recent microdiscectomy. Claimant subsequently underwent a lower back MRI.

17. Based upon the Claimant's pain complaints, the MRI results and his concern about the possibility of potential diskitis as a result of the November 20, 2014 surgery, Dr. Prusmack performed urgent back surgery on Claimant on April 10, 2015. He specifically performed an anterior lumbar interbody fusion at L3-L4 and L4-L5. Dr. Prusmack did not have authorization for the procedure from Insurer.

18. Dr. Prusmack explained the necessity of the procedure in his operative report. He stated, in relevant part,

> [Claimant's] pain became relentless, leg became weak, so she came to the ER. At that point, we had a new MRI, which showed increased edema in the endplates, hyperemic in the disc as well as a large synovial cyst causing far lateral recess stenosis and progression of the adjacent level L4-5 stenosis. Based on the concern of diskitis as well as significant instability and synovial cyst, the patient needed an urgent decompression and fusion. Because the L3-4 fusion would be adjacent to an already stenotic level, we needed to include that into the fusion. I do believe that this is directly related from either the last surgery which was the discectomy or the natural progression of an unstable level, which was instigated originally by other work-related incident, now subsequently needed to be addressed or could have been due to instability incurred in the first L3-4 diskectomy.

19. On August 3, 2015 the parties conducted the pre-hearing evidentiary deposition of Dr. Prusmack. Dr. Prusmack noted that during the April 10, 2015 surgery he found a disc herniation with narrowed impingement and a severely decompressed

nerve. He described Claimant's worsening condition after the November 20, 2014 surgery. Claimant's additional pain was caused by instability in the spine because of the November 20, 2014 surgical procedure. He summarized that Claimant may have been headed toward additional surgery because of the motor vehicle accident but the "discectomy sure got her there faster." Moreover, Dr. Prusmack commented that Claimant's synovial cyst at L3-L4 caused further instability. Finally, Dr. Prusmack remarked that Claimant's mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015 surgery.

20. Claimant testified that subsequent to the April 10, 2015 surgery she recuperated at a rehabilitation center for approximately 10 days. She then underwent physical therapy and progressed to the point where she has 100% use of her right leg. Claimant explained that she still experiences some soreness but is pleased with the outcome of the surgery.

21. Dr. Reiss testified at the hearing in this matter. He explained that Claimant suffered from pre-existing, recurring back problems. He remarked that the November 16, 2012 x-ray revealed no acute injuries. However, the MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss commented that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He remarked that there was no finding on Claimant's MRI reflecting an acute injury.

22. Dr. Reiss testified that he reviewed the January 22, 2013 MRI report in which there was a paracentral disc extrusion at L3-L4. The disc was protruding within the spinal canal but not outside of the canal. Dr. Reiss expressed concern that Dr. Prusmack performed a far lateral L3-L4 discectomy on the right, because from all of the medical records and MRI reports, there was nothing to suggest surgery in the far lateral location. All of Claimant's problems were in the spinal canal. Dr. Reiss explained that he would have performed a discectomy at L3-L4 within the spinal canal to relieve pressure from Claimant's L4 nerve root,

23. Dr. Reiss explained that the February 26, 2014 MRI revealed a worsening of Claimant's lower back symptoms. He specifically noted that Claimant suffered from the degenerative change of spondylosis at L3-L4 and L4-L5.

24. Dr. Reiss testified that the L3-L4 and L4-L5 fusion was not reasonable or necessary. He remarked that Claimant's pain generator had not been identified. Moreover, the L3-L4 and L4-L5 fusion surgery was not causally related to Claimant's November 12, 2012 work-related motor vehicle accident.

25. Claimant has failed to demonstrate that it is more probably true than not that the L3-L5 fusion surgery performed by Dr. Prusmack on April 10, 2015 was reasonable, necessary and causally related to her November 12, 2012 admitted industrial injuries. Claimant suffered from preexisting, degenerative lower back problems. In fact, the November 16, 2012 x-ray revealed degenerative changes but no evidence of a traumatic injury to the lumbar spine. As Dr. Reiss persuasively explained,

an MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss commented that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He remarked that there was no finding on Claimant's MRI reflecting an acute injury. The recurrence of Claimant's lower back pain was the natural course of her pre-existing condition. Moreover, imaging studies demonstrated multiple levels of degenerative changes from L2-S1. Dr. Reiss summarized that the L3-L4 and L4-L5 fusion was not reasonable or necessary. He remarked that Claimant's pain generator had not been identified. Moreover, the L3-L4 and L4-L5 fusion surgery was not causally related to Claimant's November 12, 2012 work-related motor vehicle accident.

26. In contrast, Dr. Prusmack explained that the additional pain Claimant was experiencing was caused by instability in the spine because of the November 20, 2014 surgical procedure. He summarized that Claimant may have been headed toward additional surgery because of the motor vehicle accident but the "discectomy sure got her there faster." Moreover, Dr. Prusmack commented that Claimant's synovial cyst at L3-L4 caused further instability. Dr. Prusmack concluded that Claimant's mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015 surgery. However, Dr. Prusmack's testimony is not persuasive because doctors Guiot and Rauzzino determined that Claimant might need fusion surgery from L3-S1 before Dr. Prusmack performed the decompression at L3-L4. The need for surgery was due to Claimant's degenerative spine condition and unrelated to the November 12, 2012 work-related motor vehicle accident. As Dr. Reiss commented, the February 26, 2014 MRI revealed a worsening of Claimant's lower back symptoms. He specifically noted that Claimant suffered from the degenerative change of spondylosis at L3-L4 and L4-L5. Claimant's pre-existing lower back condition did not aggravate, accelerate or combine with her November 16, 2012 industrial injury to cause a need for the April 10, 2015 surgery.

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 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 L3-L5 fusion surgery performed by Dr. Prusmack on April 10, 2015 was reasonable, necessary and causally related to her November 12, 2012 admitted industrial injuries. Claimant suffered from preexisting, degenerative lower back problems. In fact, the November 16, 2012 x-ray revealed degenerative changes but no evidence of a traumatic injury to the lumbar spine. As Dr. Reiss persuasively explained, an MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss commented that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He remarked that there was no finding on Claimant's MRI reflecting an acute injury. The recurrence of Claimant's lower back pain was the natural course of her pre-existing condition. Moreover, imaging studies demonstrated multiple levels of degenerative changes from L2-S1. Dr. Reiss summarized that the L3-L4 and L4-L5 fusion was not reasonable or necessary. He remarked that Claimant's pain generator had not been identified. Moreover, the L3-L4 and L4-L5 fusion surgery was not causally related to Claimant's November 12, 2012 work-related motor vehicle accident.

6. As found, in contrast, Dr. Prusmack explained that the additional pain Claimant was experiencing was caused by instability in the spine because of the November 20, 2014 surgical procedure. He summarized that Claimant may have been headed toward additional surgery because of the motor vehicle accident but the "discectomy sure got her there faster." Moreover, Dr. Prusmack commented that Claimant's synovial cyst at L3-L4 caused further instability. Dr. Prusmack concluded that Claimant's mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015 surgery. However, Dr. Prusmack's testimony is not persuasive because doctors Guiot and Rauzzino determined that Claimant might need fusion surgery from

L3-S1 before Dr. Prusmack performed the decompression at L3-L4. The need for surgery was due to Claimant's degenerative spine condition and unrelated to the November 12, 2012 work-related motor vehicle accident. As Dr. Reiss commented, the February 26, 2014 MRI revealed a worsening of Claimant's lower back symptoms. He specifically noted that Claimant suffered from the degenerative change of spondylosis at L3-L4 and L4-L5. Claimant's pre-existing lower back condition did not aggravate, accelerate or combine with her November 16, 2012 industrial injury to cause a need for the April 10, 2015 surgery.

ORDER

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

Claimant's L3-L5 fusion surgery on April 10, 2015 was not reasonable, necessary or causally related to her November 12, 2012 admitted industrial injury.

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

DATED: September 11, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Compensability: whether the claimant has established by a preponderance of the evidence that her injury occurred arising out of and in the course of her employment with the respondent-employer.

2. If so, whether the claimant has established by a preponderance of the evidence that her medical treatment was reasonable, necessary and related to her work injury.

3. If so, whether the claimant has established by a preponderance of the evidence that the right of selection of an authorized treating physician passed to her.

FINDINGS OF FACT

1. The claimant works as a warehouse worker for the respondent-employer and did so at all relevant times. The claimant reported a work related injury to her right shoulder, right wrist and back that occurred on December 11, 2012 when she slipped and fell in the parking lot adjacent to the building in which she worked at approximately 4:05 p.m. on December 11, 2012.

2. The claimant was President of the union, an elected position that she voluntarily ran for with no encouragement from the respondent-employer. While employees have a nominal monthly amount deducted from their paycheck for union dues, they are not required to attend union meetings and/or run for an elected union office. Union meetings, except for those that involve negotiations with the employer, are not allowed to be held during work hours. Also, the employee participants, including the elected officers, are not paid to participate in union meetings unless it involves negotiations with the employer. The employer did nothing to encourage employees' participation in the union and there were no adverse repercussions to any employee who did not participate in the union.

3. On the date of her injury, the claimant arrived for work at approximately 7:00 a.m. and clocked out of work at approximately 3:30 p.m. The only things that she brought to work with her that morning were her car keys and wallet. She parked in a

location that was approximately fifty feet from her office building and it took her only a few minutes to walk from her vehicle to her office building.

4. The claimant arranged and participated in a union meeting after work on the date of her injury with Mr. Joe Gomez, the Vice President of the union, and Cheryl Hutchinson, the AFSCME Director who was based out of Denver and not employed by the respondent-employer. Other employee union members were allowed to participate in this meeting, but the employer was not allowed to participate in this meeting.

5. The purpose of the meeting was to review and make any necessary changes to the new collective bargaining agreement. The meeting was held in the first floor conference room of the building where the claimant worked. Immediately after she clocked out, the claimant went to the union meeting. If she had not attended the union meeting, it would have taken her only a few minutes to walk to her vehicle in the adjacent parking lot.

6. The employer allowed the conference room to be used for union meetings as an accommodation. It was not meant to signal the employer's approval or lack thereof of such activities. Union meeting were also held in other locations in town, including but not limited to the union hall and various restaurants in town.

7. At the meeting on the date of her injury, the claimant was given copies of contracts to take home with her. Also, during the meeting, the claimant made arrangements with Ms. Hutchinson for her to come to the claimant's home directly after the meeting to pick up some additional union documents.

8. The claimant left the meeting at approximately 4:05 p.m. and walked directly to her vehicle in the parking lot. In addition to her keys and wallet, the claimant was carrying union contracts as she walked to her car. Once she arrived at her car, she opened the car and "put her things down," on the seat of her car. Her "things" consisted of her car keys, wallet and the union contracts. After putting her things down, the claimant slipped and fell and her body hit her car door.

9. Ms. Hutchinson was walking to her vehicle at this same as the claimant was walking to her vehicle, but she did not appear to see the claimant fall. After the claimant fell, she drove to her home to meet Ms. Hutchinson as previously planned and told her what happened. Ms. Hutchinson arrived at the claimant's home, retrieved union documents from the claimant and left after five to ten minutes.

10. After initially providing medical care benefits to the claimant, on March 5, 2013, the respondent filed a Notice of Contest after discovering the claimant's participation in union activities at the time of her injury.

11. The ALJ finds that the claimant was not in the performance of duties that benefitted the respondent-employer at the time of her injury and that she was engaged in personal matters that were beyond the scope of her employment with the respondent-employer.

12. The ALJ finds that the claimant has failed to establish that it is more likely than not that her injury arose out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case the ALJ finds that while the claimant's testimony was credible, it supports that the claimant was not in the course and scope of

her employment at the time of her injury. The ALJ further finds Ms. Icabone's testimony to be credible and finds that it likewise supports that the claimant was not in the course and scope of her employment at the time of her injury.

4. An employee is entitled to worker's compensation benefits if injured performing service arising out of and in the course of employment. C.R.S. §8-41-301(1)(b)(c); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). Injuries "arise out of" the employment when the activity giving rise to the injuries is sufficiently interrelated to the conditions and circumstances under which the claimant generally performs his job, that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). In other words, the job or the injury placed the individual in a position where injury resulted. The "course of employment" requirement is met when the injuries occur during the time and place limits of the employment. *Popovich v. Irlando*, *supra*. There must be a direct causal relationship between the employment and the injuries. See C.R.S. §8-41-301 and *Ramsdale v. Horn*, 781 P.2d 150 (Colo. 1989).

5. While the claimant had clocked out from work, it is well settled that the "course of employment" embraces a reasonable interval before and after official working hours when the employee is on the employer's property. *Larson, Workers' Compensation Law* § 21.06(1); *Industrial Commission v. Hayden Coal Co., 113 Colo. 62, 155 P.2d 158 (1944)*; *Ventura v. Albertson's Inc., 856 P.2d 35 (Colo. App. 1992).* Here, the claimant's injury took place at least 35 minutes after the claimant "clocked out" with no intention of returning to work on that day. Therefore, the claimant was not in the course of her employment at the time of her injury. *Wilson v. Dillon Companies, Inc.*,W.C. No. 4-937-322-01 (2015) is distinguishable. In that case, the claimant, a barista in a grocery store, went grocery shopping after her shift and then slipped and fell in the parking lot. The *Wilson* claimant however was encouraged by her employer to grocery shop in the store and was provided incentives, including coupons. Therefore, the ALJ did not find the grocery shopping to be a personal deviation.

6. Assuming, *arguendo,* that the claimant was in the course of her employment at the time of her injury, the inquiry does not stop there. The claimant must also satisfy the "arising out of" requirement for compensability. The "arising out of" element is narrower than the "course" element and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando, supra.* The "arising out of" test is one of causation. *See Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542 (1968).* The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's

employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *City of Brighton v. Rodriquez, supra*.

7. In order to satisfy the arising out of requirement, it is not necessary that the claimant actually be engaged in performing job duties at the time of the injury. *See Employers' Mutual Ins. Co. v. Industrial Commission, 76 Colo. 84, 230 P. 394 (1924).* Our courts have recognized that it is not essential for the compensability determination that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer so long as the employee's activities are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *See also Price v. Industrial Claim Appeals Office, 919 P.2d 207, 210 (Colo. 1996)* (an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment"). It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst, 905 P.2d 9 (Colo. App. 1995).* Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary, and an accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, 907 P.2d 715 (Colo. App. 1995)*

8. In contrast, if an employee substantially deviates from the mandatory or incidental functions of her employment, such that she is acting for her sole benefit at the time of an injury, then the injury is not compensable. *Kater v. Industrial Commission, 728 P.2d 746 (Colo. App. 1986); see also Callahan v. Nekoosa Papers, Inc.*, W.C. No. 3-866-766 (May 8, 1989)(claimant working on his car in the employer's parking lot with his own tools was not engaged in an activity incidental to his employment). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Panera Bread, LLC v. Industrial Claim Appeals Office, 141 P.3d 970 (Colo. App. 2006).*

9. The question of when a personal deviation has ended and the claimant has commenced the return to employment duties is generally one of fact for determination by the ALJ. Further, the claimant bears the burden of proof on this issue. *Wild West Radio, Inc. v. Industrial Claim Appeals Office, 905 P.2d 6 (Colo. App. 1995).*

10. As a general rule, union activities are personal and, therefore, if a worker is injured while participating in a union meeting, the claim is not compensable. *See*, 3-27 *Larson's Workers' Compensation Law* §27.03[3][a]. *See also, Spatafore v. Yale Univ.,* 684 A.2d 1155 (Conn. 1996) (Claimant who was injured walking back to work after attending a union meeting during her unpaid lunch break was denied workers' compensation benefits. The accident occurred on the defendant's premises, the union meeting was held on the defendant's premises, the meeting was not a grievance or negotiating meeting, employer representatives were not allowed and the claimant's participation was voluntary.)

11. After the claimant clocked out, she went directly to a union meeting. After the union meeting, the claimant walked directly to her vehicle. The claimant carried union contracts to her vehicle after the union meeting and had to put them down on the seat of her car prior to entering her vehicle and just before she slipped and fell. Prior to walking to the parking lot, the claimant made arrangements to meet Ms. Hutchinson, another union representative who was not employed by the respondent-employer, at her home to conduct additional union business. The claimant met Ms. Hutchinson at her home after her slip and fall and conducted additional union business.

12. The ALJ concludes that since at least 35 minutes elapsed since the claimant clocked out of work with no intention of returning, her injury did not occur within the course of her employment. Furthermore, since the claimant continuously participated in union activities from the time she clocked out until she arrived home and afterwards, the claimant's injury did not arise out of her employment. The claimant deviated from her employment when she attended the union meeting. This was a personal deviation from which she did not return that day. There is a clear chain of events that reflects the claimant's continuous participation in union activities from before, during and after her fall. Therefore, the claimant's injury did not arise out of her employment with the respondent-employer.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that her injury arose 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: September 3, 2015

/s/ original signed by:

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

PROCEDURAL MATTER

During the deposition testimony of Dr. Machanic on June 8 and June 18, 2015, Respondents objected to the introduction of Claimant's offered Exhibits 18, 19, 21, and 22, as in contravention of the ALJ's oral ruling at the conclusion of the April 30, 2015, wherein the ALJ precluded the development of additional evidence post hearing. Having reviewed the record and the deposition transcripts, the ALJ overrules Respondents' objections and admits Claimant's Exhibits 18, 19, 21 and 22 concluding that the aforementioned Exhibits do not constitute "new evidence" as contemplated by the ALJ's April 30, 2015 oral ruling. Rather, the ALJ finds and concludes that the Exhibits in question constitute materials which "explain" the foundation and basis for the various opinions expressed by multiple experts who have weighed in on the subject of Claimant's permanent impairment rating. Thus, the ALJ concludes that the exhibits merely provide context to the existing evidence, i.e. the various opinions and impairment rating reports authored by Drs. Lakin, Higginbotham, Ridings and Machanic. They do not represent substantive evidence or legal theories propounded by Claimant as prohibited by the ALJ's April 30, 2015 ruling.

ISSUES

I. Whether Respondents overcame the permanent partial impairment ratings assigned by Dr. Higginbotham Division IME physician, for thoracic spine impairment and for episodic neurologic disorders by clear and convincing evidence;

II. Whether Respondents overcame the scheduled permanent partial impairment rating assigned by Dr. Higginbotham for causalgia affecting the inferior lateral brachial cutaneous sensory nerve by a preponderance of the evidence;

III. Whether Claimant has proven by a preponderance of the evidence that he is entitles to maintenance medical benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the disposition testimony of Dr. Mechanic and Ridings, the ALJ enters the following findings of fact:

1. On June 26, 2013, while working for Employer, Claimant, a long-haul trucker, was cresting a hill with his tractor-trailer on a rural highway near Carrol, Nebraska when he encountered a piece of farm equipment in the road. Claimant, who was traveling with his 14 year old son, attempted to miss the slow-moving implement by passing it on the left. He struck the left front of the implement with the right side of his truck. After the impact, Claimant's truck left the highway, traveling into the ditch and a stand of trees. The truck

came to a rest after striking a tree after which the truck caught fire. Claimant briefly lost consciousness when his forehead hit the windshield in the accident,

2. Claimant's 14-year-old son pulled him from the truck, and he was taken by ambulance to Faith Regional Health Services, in Norfolk, Nebraska Claimant suffered burns over his left upper arm, left back, the tip of the left shoulder, and the right medial thigh (Respondents' Exhibit D, Bates 144-152)..

3. Claimant was initially diagnosed with flame burns of left arm, left tip of shoulder, eleven (11) different stripe-like burns across the left hemithorax and across the low back above the belt, and several smaller areas. In the emergency room, Claimant complained of a loss of consciousness, pain in his head, neck, left arm and elbow, confusion, syncope, nausea, and dizziness. The doctor noted impaired short-term memory, second-degree burns on the left elbow and distal humerus, left trapezius, left shoulder, a left ear laceration, and some burns on the left cheek (R's Ex. D, Bates 144-152).

4. Claimant remained in the hospital, and was released on June 27, 2013.

5. Claimant has no independent memory from just before seeing the farm equipment on the road until sometime later. He admitted that some of the information he has about the accident, his hospital stay in Nebraska, and the drive back to Colorado is probably from what others have told him.

6. Claimant was admitted to St. Mary-Corwin Hospital in Pueblo, Colorado, on June 29, 2013, with worsening complaints of headache, fatigue, confusion, extreme nausea, episodes of confusion, left elbow and knee tenderness, and left neck pain and spasms. Objective findings were a laceration at the attachment of the ear to the scalp, left cervical muscle spasm, erythema and burn over the left side of the neck, erythema and blistering at the waistband, blistering and yellow exudate on the left arm from the humerus to the mid forearm, with some "white tissue" underneath, and swelling in the left arm (R's Ex. E, Bates 154-156).

7. Claimant was discharged from St. Mary-Corwin on June 29, 2013, with additional diagnoses of whiplash and post-concussive syndrome (R's Ex. E, Bates 158), and he was referred to University of Colorado Health Sciences Center Burn Center (CU) because of the partial-thickness second-degree burn over a joint space (R's Ex. E, Bates 157,158).

8. Claimant was initially evaluated at CU on July 2, 2013, where he was diagnosed with mixed full- and partial-thickness burns to his left arm, and partial-thickness burns to his left neck, left periauricular area, and lower back (R's Ex. F, Bates 159). By July 9, 2013, the neck burns were healing well, however, it was determined that the proximal aspect of the burn near Claimant's left elbow remained white and non-blanching, with low chance of spontaneous healing of this full-thickness burn, and the left lower flank burn had healing interspersed with whitened areas, so grafting was prescribed (R's Ex. F, Bates 167-168).

9. Michael J. Schurr, M.D., performed skin grafting surgery on July 12, 2013. The post-operative diagnoses were full-thickness burn to the posterior left arm (200 sq.cm.) and left flank, with a healing partial-thickness burn to the left forearm (20 sq.cm.). The left thigh (200 sq. cm.) was the site of the donor graft (Claimant's Ex.6, Bates 86).

10. On July 19, 2013, Claimant continued to demonstrate left upper extremity edema and tenderness. By August 8, 2013, he was complaining of occasional sharp shooting pains in the left elbow skin graft. He was diagnosed with "Neuralgia, neuritis, and radiculitis, unspecified," and his burns were characterized as "Burn (any degree) involving 10-19% of body surface" (R's Ex. F, Bates 175)(C's Ex. 6, Bates 116).

11. Claimant continued his follow-up at CU through August 27, 2013, when complaints of shooting pain and tenderness to the back of the left arm were noted, as was decreased elbow range of motion (C's Ex. 6, Bates 127).

12. Terrence Lakin, D.O., first examined claimant on August 28, 2013. Claimant provided him with the history of the vehicle accident, and complained of pain (aching, burning, pins and needles) in the neck back, right (sic) arm, and bilateral knees (C's Ex. 7, Bates 132-140). Dr. Lakin's physical examination revealed tight muscles in the trapezii and tight thoracic spine paraspinal muscles, stiff neck in most planes, decreased range of motion in the elbow, full shoulder range of motion with the occasional "click," extensive scarring/graft resolving, with reduced range of motion due to scarring contractures, and the healing large horizontal lumbar scar. Dr. Lakin's diagnoses were: concussion with loss of consciousness, bilateral knee sprains, cervical strain, bilateral shoulder strains, and full-thickness skin loss. Dr. Lakin referred claimant for chiropractic, hand therapy, and medications.

13. At the September 19, 2013, visit, Dr. Lakin noted that ". . . he continues to have some vertigo symptoms. He identifies this occurring nearly once a day. Always happens with positional changes of bending over twisting or getting up" (C's Ex.7, Bates 146).

14. On October 10, 2013, Dr. Lakin noted claimant was "demonstrating some left lateral and medial epicodyles are pain" (NOTE from Swanberg: it appears that either Dr. Lakin uses voice-recognition software or types his notes himself and does not proof his reports, as there are many misspelled words and grammatical errors). Dr. Lakin opined that the epicondylitis may have been from inflammation and trauma from the burn scars (C's Ex. 7, Bates 154).

15. On October 31, 2013, Dr. Lakin again noted tight thoracic spine paraspinal muscles. Claimant stated that the chiropractic was helping his back, and that his dizziness and balance were improved from physical therapy. Dr. Lakin recommended continued hand therapy, chiropractic, and physical therapy, offering injections to the lateral epicondyle and trigger point injections to the left trapezius, but Claimant declined these because of a fear of needles (C's Ex.7, Bates 161-162).

16. At the November 21, 2013, visit, Claimant again complained of headaches, neck

stiffness, sleep difficulties, and symptoms of both lateral and medial epicondylitis. He advised Dr. Lakin that when he stopped chiropractic because he was out of town, his cervical and thoracic pain increased (C's Ex.7, Bates 168-169). Dr. Lakin prescribed Naprosyn, and referred Claimant to Dr. Caughfield regarding his headaches, sleep difficulties, and epicondylitis (C's Ex.7, Bates 168).

17. On December 5, 2013, Claimant was seen by Dwight K. Caughfield, M.D., complaining of vertigo, epicondylitis and elbow pain, chronic neck pain that, "he states is constant mid cervical to lower cervical, right side greater than left side. It will radiate suboccipitally and rates it around a 6-7/10. When it does get into the base of the skull, it will generate a headache. He gets an average 3-4/10 supoccipital headaches. If he does computer work, does much driving or manual work, it will progress towards a migraine type headache with photophobia, nausea, and sensitivity to motion of the head. It is not resolved with non-steroidals. He will have to go to sleep to get rid of the headache. These occur two to three times per week on average . . . He also reports he has problems with short-term memory. He cannot remember tasks that were common place for him before the accident." Claimant advised that he did not have any significant neck pain, headaches, left arm pain, or cognitive issues until his trucking accident on June 26, 2013 (C's Ex.9, Bates 249).

18. Dr. Caughfield's "review of systems" notes headaches, loss of sleep, forgetfulness, vertigo that is responding to therapy, occasional blurred vision particularly with the headaches, and nausea with headaches. Dr. Caughfield's "brief partial mini mental status exam" revealed claimant had some difficulty with object recall (immediate: 3/3; at ten minutes, 0/3). Claimant did not recall the day of the week and could only do three Serial 7's (C's Ex.9, Bates 250).

19. Dr. Caughfield's impressions were post-concussive complaints, memory loss, depression, increased irritability, agitation, headaches, and cervicalgia. The doctor opined that he did not believe claimant's headaches were post-concussive, "as much as cervicogenic with secondary migraines by claimant's description of neck pain precipitating suboccipital pain, and then migraines." He opined that Claimant's migraines were generated in the cervical spine (C's Ex.9, Bates 251).

20. Dr. Caughfield recommended a neuropsychological examination based on Claimant's cognitive complaints and the deficiencies on the brief cognitive evaluation, and also to address Claimant's anxiety and irritability, "which can mean an affective component of a closed head injury". He recommended a cervical MRI, increasing the Gabapentin, consideration of alternative medication if claimant didn't respond to the Gabapentin, consideration of trigger point injections, which claimant declined on December 5, 2013, because of his needle phobia, initiation of Imitrex, avoidance of non-steroidals because of possible rebound headaches, and consideration of a left lateral epicondylar steroid injection (C's Ex.9, Bates 251).

21. A December 9, 2013, cervical MRI revealed minor disc bulging and signal loss in

the nucleus pulposus at C3-4; shallow disc protrusion posterolaterally on the right with an indentation of the ventral margin of the right lateral recess, and crowding of the right C6 nerve with probable mild nerve impingement at C5-6; and minor disc bulging without nerve impingement at C6-7 (C's Ex. 10, Bates 264-265).

22. On December 10, 2013, Claimant complained to Dr. Lakin of head and neck pain, pain intensity 4-8/10, memory loss, joint pain, stiffness, muscle weakness, and muscle aches. Dr. Lakin's exam revealed neck stiffness in most planes, tight trapezius muscles, and tight thoracic spine paraspinals. The headaches were occurring nearly nightly. Dr. Lakin reviewed the MRI with claimant on December 10, 2013. Claimant advised that chiropractic had helped the headaches greatly and he wanted to continue with it. He also said that his balance was still subpar in physical therapy, and he would like to continue therapy for that. Dr. Lakin prescribed continued chiropractic, physical therapy including dry needling, TENS, and continued treatment of claimant's lateral epicondylitis, a referral to Dr. Hopkins for post concussion headaches and recall memory loss, and trigger point injections by Dr. Caughfield (C's Ex. 7, Bates173-177).

23. In the December 12, 2013, physical therapy report (NOTE: for some reason, this appears to be the first physical therapy report either party has, although the therapist notes that this was the tenth visit), the therapist notes that Claimant was resuming therapy at Dr. Lakin's request for ongoing daily headaches and persisting bilateral elbow pain, although Claimant had been "in therapy already for treatment of dizziness and chiropractic care for his neck with some improvements but remains most limited due to his headaches and ongoing intermittent elbow pain. He describes his elbows more as soreness and stiffness in the elbow that increases with activities. He reports that while the ROM and wrist area improved with hand therapy, the elbows have not really been formally address (sic). His headaches remain temporarily improved with chiropractic but he remains dependent on this care for movement within the neck" (C's Ex. 7, Bates 179).

24. The therapist's objective exam revealed "ongoing mild forward head and rounded shoulders, abducted and tilted scapulas, visible pectoralis contracture" . . . end-range extension range of motion of the elbow causing sharp pains on medial and lateral epicondyles on the left . . . left wrist and hand range of motion within full limits with ongoing soreness in the left Dequervain's region and mild pulling into forearm and elbow. The therapist found numbness along the skin graft and increased tenderness and adhesion present within the hypertrophic scar on the lateral elbow. She found severe point tenderness on the medial and lateral epicondyles with palpable scar tissue with mild tenderness on musculotendinous junctions of extensor carpi radialis longus and brevis and flexor digitorum, cervical increased tone, tenderness, and symptoms reported as pulling in the suboccipital region and upper trapeziums, and large trigger points in the upper trapeziums and pectorals. Her findings were that Claimant continued to have chronic left elbow epicondylitis and mild tendinosis caused by the traumatic accident and "likely excessive gripping of the steering wheel. The patient also continues to demonstrate ongoing cervical myalgia with large trigger points present that remain consistent with a whiplash injury" (C's Ex.7, Bates179-180).

25. The therapist utilized trigger point dry needling to claimant's distal posterior and anterior trigger points of the bilateral upper trapeziums, bilateral suboccipitals, superior upper trapezius as it inserts on the occiput, and his bilateral lateral pectoralis major (C's Ex.7, Bates 181).

26. On December 18, 2013, Claimant reported to Dr. Caughfield that the Imitrex helped with his migraines, usually within thirty minutes with a single dose. Claimant's headaches were overall decreasing, with the migraines occurring one to two (1-2) times per week. But, Claimant still had constant neck pain. Dr. Caughfield reviewed the cervical MRI. He diagnosed cervicalgia with cervical herniation and headaches, and cognitive complaints with concussion history. He continued the Imitrex, recommended increasing the Gabapentin dosage, and recommended an epidural steroid injection (C's Ex.9, Bates 253).

27. On January 2, 2014, Claimant reported to Dr. Lakin that he was having headaches twice a week, but that dry needling and chiropractic helped a lot. Dr. Lakin's exam revealed tenderness at C2-3, mild axial load tenderness in the neck, and reduced cervical range of motion. Dr. Lakin found tenderness at T4-7, most notably in the right thoracic paraspinal muscles, and nonspecific lumbar tenderness (C's Ex.7, Bates 185-186). Dr. Lakin continued making similar thoracic findings throughout the remainder of his examinations between February 2 and April 30, 2014 (C's Ex. 7, Bates 193, 200, and 210).

28. On January 9, 2014, Claimant complained to Dr. Caughfield of a "pounding" headache, suboccipital and occasional frontal, although he was no longer having migrainous type headaches. "He has not had to lock himself into his room." Claimant continued to have pain into the shoulders, with the left shoulder awakening him at night. Dr. Caughfield felt the headaches were improving and that they were due to the cervical herniation with myofascial generated headaches and not necessarily post concussive. Claimant had left shoulder weakness, which Dr. Caughfield stated was "progressive weakness since my first visit and may be due to deconditioning but may also be due to progression of pathology" (C's Ex.9, Bates 254).

29. Claimant was seen by Michael C. Sparr, M.D., on January 22, 2014. Claimant's chief complaints were severe headaches, neck and shoulder pain, and memory deficit. Claimant stated that, overall, he had had only 2% improvement since the initial accident. On a pain diagram (NOTE from Swanberg: we do not have this pain diagram in our medical records), Claimant placed marks indicating pain in the right and left sides of his occiput, bilateral cervical regions, mid thoracic, bilateral superior shoulders, and left lateral arm. He described his morning headaches as severe right-sided occipital burning pain. It had been exclusively right sided, but now, was occurring bilaterally. The pain radiated off the top of his head into the temporal and frontal regions, causing severe headaches which could become pounding and throbbing with some associated phonophobia and photophobia, and some nausea. The headaches were always associated with neck pain. The neck pain was bilateral, which Claimant described as "ripping" and radiating to the left scapula. This was usually mild early in the day, but became worse by the mid and later portions of the day. He had occasional shooting pain radiating to his bilateral thumbs. His

left shoulder pain was constant, achy, and at times sharp and stabbing, and was over the lateral aspect of the shoulder, radiating to the elbow (C's Ex. 12, Bates 272-273).

30. During his physical examination, Dr. Sparr found "profound increased muscle tension in bilateral upper quadrant musculature, straightening of the cervical lordosis at rest, and a rounded shoulder posture." There was exquisite tenderness to palpation over bilateral greater and lesser occipital nerves. Direct palpation caused reproduction of claimant's typical headache symptoms. Claimant was "quite exquisitely" tender over the upper cervical facets, tender over the cervical musculature including splenius capitis and cervicus, anterior and posterior scalenes, levator scapula, trapezius, and rhomboids. Dr. Sparr found numerous tight fibrocystic nodules and multiple trigger points within the upper quadrant muscles. Claimant was diffusely tender over the mid and upper thoracic facets (C's Ex. 12, Bates 274).

31. Dr. Sparr diagnosed:

- Cervical and thoracic sprain/strain injuries.
- Right C5-6 disc herniation causing intermittent right C6 radiculopathy.
- Upper cervical facet dysfunction and arthralgias.
- Profound cervical and parascapular myofasciitis.
- Mid thoracic facet dysfunction.
- Headaches likely related to a combination of myofasciitis, cervical facet dysfunction, and occipital neuritis as well as post concussive syndrome.
- Likely concussion.
- Left shoulder rotator cuff irritation and impingement.

He recommended ongoing chiropractic treatment, dry needling, massage therapy, that trigger point injections were "strongly recommended," consideration of a subacromial bursa injection, and possibly upper cervical facet or epidural steroid injections, continuation of Gabapentin, Sumatriptan, ibuprofen, and a combination analgesic ointment for topical use.(C's Ex. 12, Bates 273-274).

32. On February 5, 2014, Dr. Sparr's physical exam revealed persistent myofascial tightness in the cervical and parascapular muscles, moderate tenderness over the upper cervical facets, but far less tenderness over the greater and lesser occipital nerves. He found that claimant was still *tight* and tender over the mid thoracic paraspinals and minimally tender over the left rotator cuff. Dr. Sparr's diagnoses were the same as on January 22, 2014, and he found that Claimant had had an excellent response to the occipital nerve blocks. He provided trigger point injections into the bilateral upper quadrant muscles, recommended continued chiropractic with Dr. Young once per week, continued physical therapy, Gabapentin and Sumatriptan, and again recommended a cervical epidural steroid injection, which he felt may be of significant benefit (C's Ex. 12, Bates 276-277).

33. In his February 19, 2014, report, Dr. Sparr pointed out that claimant had found the

trigger point injections with chiropractic was partially beneficial in decreasing muscle tightness. He also stated that his headaches were "extremely good" after the occipital nerve block, but that they had become more recurrent and daily since then. Dr. Sparr's objective examination revealed persistent, profound and myofascial *tightness* in the bilateral upper quadrant muscles, *tight* and tender upper cervical facets, and exquisite tenderness over the greater and lesser occipital nerves. Spurling's maneuver was mildly positive on the right causing radiation of pain in the lateral arm and thumb. Claimant had left shoulder tenderness over the conjoined tendinous insertion, pain with mid-range abduction and internal rotation, and a positive impingement sign. He provided Claimant with trigger point injections in the bilateral upper quadrant muscles to be combined with Dr. Young's chiropractic, and a left subacromial bursa injection, which completely and immediately resolved claimant's shoulder pain. He requested authorization for a cervical epidural steroid injection, suggested repeat occipital nerve blocks and possibly facet injections, after determining how claimant responded to the trigger point injections and epidural steroid injection (C's Ex. 12, Bates 278-279).

34. Claimant did not see Dr. Sparr again, however. He testified that he would like to see Dr. Sparr and have the recommended cervical epidural steroid injection and occipital nerve blocks, subacromial bursa injection, ongoing chiropractic, dry needling, massage therapy, and trigger point injections.

35. Claimant was seen for neuropsychological testing on January 15, 2014, by David C. Hopkins, Ph.D. Claimant provided a history of having striking his head into the dashboard during the accident, that he was unconscious, and that he had a two-day period of anterograde amnesia with "some islands of memory during that time." He had no prior traumatic brain injury or psychiatric injury. Claimant complained of persistent headaches, sleep issue, and mental status deficits. Dr. Hopkins opined that Claimant tended to minimize his psychological problems. He complained of both cervical and lumbar discomfort. He complained of word-finding problems; easy distractibility; that he had trouble with cooking and other tasks that required multitasking, e.g. forgetting what was in the oven or microwave, that he had to be hypervigilant with his cooking; difficulty generating ideas when talking to people; that reading caused headaches; some irritability, which he felt was contrary to his personality and which began shortly after the accident (C's Ex. 11, Bates 268-269).

36. Dr. Hopkins utilized several tests on claimant, including the MMPI-2, Wechsler Memory Scale, and the WAIS-IV. Dr. Hopkins found that Claimant worked diligently on all tests, that those tests are sensitive to performance effort, and that there was no evidence of symptom magnification or malingering. His testing revealed the following:

- Claimant tended to minimize psychological distress and presented himself in a most favorable light;
- People like claimant tend to respond to stress with physical complaints "after using repression and denial and distractibility as front-line coping strategies," that claimant appeared to "be working very hard at pushing (his mild reactive depression) under the rug."
- His perceptual problem solving was a little slow;

- His auditory immediate memory was at the 18th percentile on the Wechsler Memory Scale, lower than Dr. Hopkins anticipated;
- He had a masked depression;
- While he had some mild slowing in his perceptual problem-solving speed, his overall processing speed and working memory were technically within normal limits, although some inconsistencies were noted;
- Mild, "but significant" difficulty with retrieving information from long-term storage;
- A reduction in his verbal fluency scores;
- Mild slowing in how much complex verbal material he could assimilate quickly;
- Overall, mild neurobehavioral deficits associated with retrieval and processing speed, and to a lesser degree with working memory (C's Ex. 11, Bates 269-270).

Dr. Hopkins' diagnoses included: "Significant" Concussion, Grade III; Cognitive Disorder; Adjustment reaction with depressed mood. Dr. Hopkins stated that Claimant's findings were "consistent with the mechanisms of injury . . . and with his reported difficulties in daily life." Dr. Hopkins felt that Claimant should be able to develop adequate compensatory strategies to continue to function successfully both vocationally and avocationally, with his recommended neuropsychological counseling sessions. He also recommended biofeedback and relaxation training in order to help claimant learn some cognitive behavioral coping strategies to deal more effectively with his pain (C's Ex. 11, Bates 271).

37. Claimant was seen by William G. Beaver, M.A, LPC, licensed biofeedback counselor, on February 21, 2014. Claimant complained of neck, shoulder, and mid back pain, with daily headaches and interrupted sleep. Mr. Beaver recommended 6-8 one-hour biofeedback sessions, but claimant declined (C's Ex. 13, Bates 280-281). Claimant testified that he did not want any treatment from Mr. Beaver, not because he didn't feel it could help, but because Mr. Beaver gave claimant the "creeps." Claimant would like to try biofeedback, just with someone other than Mr. Beaver.

38. A functional capacity evaluation was performed on April 17, 2014, at Dr. Lakin's office. The overall level of claimant's voluntary effort was deemed by the occupational therapist to be reliable. The therapist's permanent work restrictions placed claimant in the sedentary light/light categories for lifting. Claimant was also restricted to occasional in squatting, bending, stair climbing, and kneeling; sitting no more than forty-five (45) minutes without a stretching break because of upper back tightness and pain, and standing and walking fifteen to twenty (15-20) minutes at a time for a total of forty (40) minutes in any one-hour time period, because of upper/mid back tightness and pain. He was precluded from crawling (because of his intolerance to weight bearing through his left upper extremity/shoulder) and reaching above the shoulders. The therapist opined that claimant had a "significant left hand grip deficit," the right averaging 117 lbs. (90th percentile), and the left averaging 39 lbs. (4th percentile) (C's Ex. 7, Bates 220-221, 228-229).

39. Dr. Lakin placed claimant at maximum medical improvement on April 30, 2014. Claimant drew a "pain diagram" at this appointment, on which he noted as "burning" areas on the back left side of his shoulder up to his thoracic spine. He noted "stabbing" pain in his left

thumb, and “pins & needles” on the back of his left upper arm from below the shoulder to the elbow (C’s Ex. 7, Bates 231).

40. His examination revealed moderate tenderness to palpation of the cervical muscles into the thoracic paraspinals, and throughout the left parascapular muscles. His diagnoses included: concussion with loss of consciousness, cervical strain with C3-4 bulging disc and C5-6 protruding disc, left posterior elbow full-thickness burn, allograft from the left thigh, full-thickness burn lumbar/left flank, left shoulder rotator cuff impingement/tendinitis, irregularity and labrum, and myofascial pain including cervical muscles, left shoulder, and left lateral epicondylitis (C’s Ex.7, Bates 237). He adopted the FCE report’s restrictions (C’s Ex. 7, Bates 238).

41. Dr. Lakin provided claimant with permanent medical impairment ratings:

- cervical spine 15% whole person;
- left shoulder loss of range of motion was 10%, and elbow loss of range of motion was 3%, which combined for a total 13% upper extremity for loss of range of motion;
- to account for claimant’s left posterior triceps and elbow scar/graft, which measured 19 cm x 10 cm, he provided an additional 11% impairment of the left upper extremity, which Dr. Lakin stated created a grade 3 causalgia, using the inferior lateral brachial cutaneous sensory nerve, table 12, indicated a maximum 21% impairment, multiplied by 50%;
- left upper extremity range of motion rating of 13%;

He combined the range of motion deficits (13%) with 11% causalgia, resulting in a 23% left upper extremity permanent medical impairment, which he converted to 14% whole person. His final rating of 27% whole person is from the combining of 15% cervical with 14% left upper extremity (C’s Ex. 7, Bates 238-239).

42. Thomas Higgenbotham, M.D., performed the Division Independent Medical Examination (DIME) on October 1, 2014 (C’s Ex. 14). His review of Claimant’s medical history is extensive. He reviewed the medical records from June 26, 2013, through July 2, 2014. Claimant filled a pain diagram, noting pain on the back of his head, on the back of his neck, along the left shoulder area to the shoulder joint, at his left elbow, down the left side of his thoracic spine, and across his middle low back (C’s Ex. 14, Bates 299). Claimant presented with complaints of pain and discomfort about the head, neck, mid back, left shoulder, left elbow, low back, and both knees. He reported that Claimant stated, “he is less than 25% of his usual physical activity. He relates he generally ‘feels like crap.’ He relates of a constant headache. He can be awaken (sic) from sleep with a headache and wakes up daily with a headache. He feels as though somebody has hit him in the back of the head with a piece of wood. He describes his headaches as a ‘2 by 4 headaches’” (C’s Ex. 14, Bates 291). Claimant complained of burning sensations of both shoulders, particularly the left scapulothoracic area. He had a deep, throbbing ache in his left elbow with occasional sharp pain with activities such as gripping, grasping, and twisting. He had to get rid of his air tools

because of his inability to sustain left hand grip (C's Ex. 14, Bates 291).

43. Claimant told Dr. Higgenbotham he had frequent dizziness. "His balance was 'not worth a damn.' He bumps into things regularly and drops things a lot. He falls occasionally. He relates that he has 'never' tripped or fallen prior to the injury. He relates that his vision is not as good as it used to be. . . He relates of blurred vision. His night vision is not as good as it used to be, and he sees halos around lights at night" (C's Ex.14, Bates 292).

44. Dr. Higginbotham's physical exam was extensive and his reporting extremely detailed. His objective exam revealed no notable pain behaviors, and he wrote that Claimant's presentation was "stoic." Claimant was sensitive to pressure palpation about the left elbow and he requested that the blood pressure cuff be placed on the right arm because of the pain it caused his left elbow. Waddell's signs were negative. Tinel's sign at the left cubital tunnel was positive. There was marked tenderness about the left forearm extensor and flexor muscle masses on mild pressure palpation. There was "notable" swelling about the left extensor muscle mass. There was moderate tenderness about the left triceps. There were neurosensory deficits to light touch, pinprick, and vibratory sense in a non-dermatomal manner of the left hand. Gripping, pinching, grasping, and particularly twisting against resistance caused pains in the left elbow/forearm. Dr. Higgenbotham noted Claimant's burn scar about the posterior distal arm, which was about 7" by 4". Claimant had no feeling about the burn-graft area. Left elbow and shoulder range of motion were limited. There was marked left bicipital groove tenderness bilaterally (C's Ex. 14, Bates 292-293).

45. Dr. Higgenbotham elicited tenderness about the cervical paravertebral and left middle trapezius and rhomboid muscles. Claimant had "exquisite" tenderness about the suboccipital areas bilaterally. There was mild tenderness on palpation across the iliolumbar areas and anterior cervical muscles, tenderness about the left pectoralis muscles. Claimant's balance was poor to fair. Cervical and thoracic range of motion was limited by pain. Lumbar range of motion was full and without pain (C's Ex.14, Bates 293). Dr. Higginbotham's diagnoses included:

- Major causalgia, left upper torso, stemming from third-degree burns of the left distal arm and elbow with medial and lateral epicondylitis and forearm extensor and flexor muscle tendinitis with bicipital tendinitis and rotator cuff tendinopathy along with peripheral neuritis;
- Chronic cervicalgia with myofascial strain and pain with structural diagnostic evidence of a C5-6 disc protrusion;
- Chronic thoracalgia with myofascial strain and pain involving the left infraspinatus, rhomboid, and trapezius musculature;
- Unrelenting cephalgia with evidence of greater occipital neuritis related to chronic suboccipital muscle tension, as well as to head trauma;
- Visuospatial disorientation with imbalance and dizziness related to head injury; and;
- Scar, left posterior distal arm (elbow area) (C's Ex. 14, Bates 294).

46. Dr. Higgenbotham agreed with Dr. Lakin's April 30, 2014, maximum medical

improvement date, and provided permanent medical impairment ratings. For the cervical spine, he utilized Table 53 IIC of the *American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition Revised (AMA Guides)* for a 5% whole person rating and 9% for loss of range of motion, for a cervical spine rating of 14% whole person. For the thoracic spine, he provided a Table 53 IIB rating of 2% and 3% for loss of range of motion for a thoracic spine rating of 5% whole person. For episodic neurologic disorders he provided 15%. For the left upper extremity rating, he provided a 3% upper extremity rating for left elbow range of motion deficits and an 8% upper extremity rating for left shoulder loss of range of motion.

47. Dr. Higginbotham also provided a rating for left upper extremity causaliga using the same method for rating as did Dr. Lakin. Specifically, Dr. Higginbotham used the sensory distribution impairments of the cervical nerve roots from Table 12, C5 to C8 to calculate an additional 11% left upper extremity impairment (Ex. 21, pp.42-43). The combined upper extremity rating was 21% (3% with 8% with 11%), which converts to 13% whole person impairment rating (C's Ex. 14, Bates 296, 303).

48. Dr. Higginbotham's final permanent medical impairment is 39% whole person (C's Ex. 14, Bates 297, 303). Respondents challenge Dr. Higginbotham decision to rate Claimant's thoracic spine, the extent of impairment he assigned for episodic neurologic disorders and his rating methodology for sensory impairment as characterized by Dr. Higginbotham as causalgia totaling 11% scheduled impairment of the left upper extremity.

49. Eric O. Ridings, M.D., performed an independent medical examination (IME) for Respondents on March 18, 2015. He utilized the medical history found in Dr. Higginbotham's DIME report (C's Ex. 16, Bates 310). Claimant's complaints were of significant pain throughout the neck bilaterally including the suboccipitals. He had headaches which were primarily occipital, but could severely increase at irregular intervals when he will have a sudden sharp pain that radiates up over the top of his head to behind his eyeball on the left, or occasionally on right. He had constant pain across the posterior left shoulder and left interscapular region between the spine and the shoulder blade. His most severe pain is in the mid supraspinatus muscle. His interscapular pain is not directly over the spine, but begins in the paraspinals, although he added that he very rarely has pain that extends across the spine into the right interscapular area. He has numbness, tingling, and aching pain that shoots down the left upper extremity. This occurs every 30 seconds, but is not as noticeable with Gabapentin. With the Gabapentin, his left upper extremity is not "asleep all the time." The paresthesias down the left upper extremity can extend into the hand and down into the thumb and pinkie finger. He has constant soreness all about the left elbow (C's Ex. 16, Bates 316-317).

50. During his IME Claimant reported ongoing memory problems, stating that he can remember things earlier in a given day, but does not recall anything about the day before. He complained about arriving at a location but having no idea why he went there. He will need to take several things with him on an errand, but has to keep going back and forth from his truck to his house in order to get them individually because he cannot remember them except for one at a time. He has driven somewhere, only to return because he could not remember why

he went there. Claimant also complained of poor sleep due to pain, a poor appetite, and a poor energy level. He had lost ten (10) pounds from before the injury. He felt colder than before the accident, and reported heartburn, morning stiffness, joint swelling, decreased coordination, feelings of stress, and mood swings. Overall, he felt no improvement since the onset of his pain (C's Ex.16, Bates 317).

51. Dr. Ridings' physical examination revealed upper extremity reflexes 2+ and symmetric, strength 5/5 except for "giveway weakness" in the left shoulder abduction due to pain, pain at the left elbow with resisted elbow flexion, normal sensation throughout the right upper extremity, but "(h)e stated that he was anesthetic to pinprick in a glove distribution in the fingers, hand, and forearm to just below the left elbow. Sensation to pinprick was normal proximal to that. He reported that claimant had tenderness and again "flinched" when he used "modest palpation" throughout the cervical spine and bilateral upper quadrants, left more than right, extending down into the lower interscapular region, and about the anterior shoulder and over the deltoid, biceps, and triceps muscles, at the medial and lateral epicondyles and proximal half of the forearm. Claimant testified that he "flinched" because Dr. Ridings came up from behind him and because Ridings' hands were cold. Dr. Ridings found increased tone in the cervical paraspinals, but normal thoracic paraspinal tone while examined prone on the table. However, claimant complained of pain in certain areas while sitting and of pain throughout the thoracic paraspinals below the inferior scapulae, which Dr. Ridings noted had not been tender while claimant was sitting down. Claimant's cervical and left shoulder range of motion was decreased. Dr. Ridings did not perform range of motion testing on the elbow. Finally, claimant complained of pain at the CMC joint of the left thumb (C's Ex.16, Bates 318-319).

52. Dr. Ridings' diagnoses were:
    - Mild closed head injury;
    - Cervical strain with possible contribution from mild disc protrusion a C5-6;
    - Ongoing cervical myofascial pain;
    - Left greater than right occipital neuralgia;
    - Left upper quadrant myofascial pain;
    - No current findings of a thoracic diagnosis, including thoracic myofascial pain;
    - Burns to the left upper extremity and left flank;
    - Some nonanatomic complaints, such as complete anesthesia on pinprick testing from just below the elbow distally, and some symptoms out of proportion to objective findings, such as the patient's pain behaviors with *light* palpation over a wide area of his neck, left upper quadrant, and left upper extremity;
    - Multiple cognitive symptoms out of proportion to the remainder of the patient's history. (C's Ex. 16, Bates 319-320).

53. Claimant's attorney arranged for an IME with Bennett Mechanic, M.D. on April 2, 2015. Dr. Machanic, in his report from this examination, agreed that the medical records form Faith Regional health Services showed a brief period of amnesia after the accident, not the two days' amnesia claimant told Dr. Machanic he had when he described the accident and his subsequent medical treatment, in detail, to Dr. Machanic. Claimant said he had no symptoms or pain in his mid-back or thoracic spine. Dr. Machanic's physical exam showed no

tenderness in the mid-back. Dr. Machanic found claimant had, "elective weakness," in his left upper extremity in his exam, and no signs of clinical depression or anxiety. Claimant had normal, intact gait, station, and coordination. Dr. Machanic uniquely found claimant had a lumbar spine diagnosis with impairment causally related to this claim's injury, and rated that impairment as 5% for an unspecified specific disorder, and 9% ROM deficit, for a combined lumbar spine impairment of 14% whole-person. Dr. Machanic agreed with Dr. Higginbotham Claimant's cervical spine impairment was 14% of his whole-person, but based that impairment on different ratings for ROM and specific impairment under Table 53 of the Guides. He felt Claimant had an impairment of 15% of his whole-person for episodic neurological disorders. He rated Claimant's shoulder impairment for ROM deficit as 6% of the left upper extremity, and Claimant's left elbow for ROM deficit as 3% of the left upper extremity. These left upper extremity ROM impairments combined to 9% of the left upper extremity. Dr. Machanic rated Claimant's left upper extremity sensory impairment for his burn and graft as 8%. He testified that he strongly disagreed with Dr. Lakin's and Dr. Higginbotham's decisions to rate this sensory deficit of the left upper extremity using cervical spine nerve roots' impairments, testifying during his deposition that rating mythology was clearly erroneous. He found Claimant's sensory loss was best rated using thoracic outlet syndrome's rating methods, and gave Claimant an 8% impairment of his left upper extremity. Finally, alone among all other providers and the other IME, Dr. Mechanic found claimant had a 5% whole-person impairment for disfigurement. His IME report does not discuss in any way the basis for that impairment, merely concluding in the Comments paragraph, "I would rate disfigurement at 5% of the whole-person." During his deposition, he admitted he did not measure, take photographs, or remember the dimensions or appearance of the disfigurement inducing scars. He said that if claimant's burns were over 3% of his body, maybe a 3% disfigurement rating would be appropriate. He did not know anything about a disfigurement award issued under the Act. In a supplemental report sent May 5, 2015, Dr. Machanic agreed with Dr. Ridings that a cervical traction unit is not appropriate.

54. Dr. Ridings addressed Dr. Higginbotham's rating of claimant's left upper extremity sensory rating. He wrote, and later testified consistently, "This entire sensory rating for the left upper extremity is "utter nonsense." Apparently what Dr. Lakin did and which Dr. Higginbotham followed was to combine the maximum value for the sensory portions of the C5, C6, C7, and C8 nerve roots from Table 12 (which is to be used for radiculopathies) to come up with a combined maximum sensory value of 21% for all four nerve roots. This was then multiplied by the severity of impairment determined using Table 10. This is equivalent to finding a grade 3 impairment of the entirety of the sensory distributions of each of those found nerve roots, which essentially cover the entire service area of the upper extremity. Clearly, this is not a logical or reasonable way to determine an impairment rating for a relatively small patch of skin at the left elbow. . . . It is no appropriate or the correct use of the AMA guides to give a rating for the entirety of each cervical nerve root in rating that peripheral nerve." He concluded the correct way to rate claimant's left upper extremity's sensory deficit at his burn and graft site was:

A much more appropriate way to determine an impairment for a given peripheral nerve which does not happen to be identified specifically in Table 14 would be to find a comparable nerve and utilize the maximum sensory value for that nerve. For instance, both the medial antebrachial cutaneous and medical brachial cutaneous nerves are identified in Table 14, either of which would be in my opinion similar in the size of its geographic distribution in the upper extremity (one somewhat larger and one somewhat smaller). Each of these two nerves from Table 14 has a maximum sensory value of 5%. Multiplying that by the 50% value assigned by Dr. Higginbotham from Table 3 yields a 2.5%, round to 3% impairment of the upper extremity. When combined with the elbow and shoulder ranges of motion impairments, this would yield a 14% left upper extremity impairment which by Table 3 is an 8% whole person impairment.

He further wrote:

The issue regarding how to rate sensory impairment for a specific area of skin in the left upper extremity was discussed at length in my bracketed comments in the body of the report. However, on my examination today the patient reported not just decreased sensation, but lack of any sensation to pinprick from the upper forearm distally in a glove distribution. When discussing his ongoing complaints from the accident, he did not mention hyperesthesia or any other specific area of sensory complaint relating to the inferior lateral brachial cutaneous nerve. As that site was skin grafted and therefore would be expected to have loss of sensation, it is not inappropriate to provide an impairment rating for it, but certainly not in the manner in which it was done by the Division reviewer.

55. However, at his deposition, Dr. Ridings changed his analysis of how to properly rate Claimant's left upper extremity sensory problems. He testified, "the area of the patient's body that is being rated is the posterior part of his upper arm extending a little bit down onto the elbow. A fairly good-sized patch which has altered sensation. And is most -- approximates, actually, the inferior lateral brachial cutaneous nerve distribution" "and also the posterior brachial cutaneous" (Dr. Ridings' Depo., pg. 29, ll. 6-9, and pg. 30, ll. 6-10). He testified that his previous opinion about utilizing nerves that were about the same size as Drs. Lakin's and Higginbotham's inferior lateral brachial cutaneous sensory nerve "was not correct" (Depo., pg. 30, ll. 10-24). Upon further review the night before the deposition, Dr. Ridings decided that Drs. Lakin's and Higginbotham's inferior lateral brachial cutaneous sensory nerve is the appropriate nerve to rate, as well as the posterior brachial cutaneous nerve, and the superficial and dorsal digital nerves. He pointed out that on Table 14, page 46 of the AMA Guides, neither nerve is listed, but the radial nerve is in two positions. So, he determined that those radial nerves should be the ones used to come up with claimant's left upper extremity permanent medical impairment rating. Both of those nerves have a maximum percentage loss of function due to sensory deficit of 5%.

56. Dr. Machanic testified that Claimant's scar tissue on the left elbow area does cover the *inferior lateral brachial cutaneous nerve* (Dr. Machanic's 6/8/15 Depo., pg. 50, ll. 1-3). As noted, Dr. Machanic disagrees with Dr. Lakin and Higginbotham that the correct method for rating the sensory disturbances on Claimant's left arm would be use of Table 12, C5-8, then grading using Table 10. He did noted however, that this would be "an appropriate sequence," if he had agreed with Drs. Lakin's and Higginbotham's anatomy (Depo., pg. 50, l. 1, through pg.51, l. 13). Dr. Machanic testified that he would not, however, utilize any of the peripheral nerves used by the other physicians. Instead, Dr. Machanic used the ulnar nerve, because Claimant's sensory loss is over the 4th and 5th fingers in an ulnar distribution (C's Ex. 17, Bates 327).

57. Based upon the evidence presented, the ALJ finds that Claimant has consistently complained of sensory changes in the left forearm and hand in an ulnar distribution. Consequently, the ALJ finds that Claimant's sensory impairment is limited to his extremity and does not affect a bodily structure beyond the arm at the elbow. Crediting the testimony of Dr. Mechanic, a board certified neurologist, the ALJ finds that the most appropriate method to rate Claimant's left upper extremity sensory loss was that which Dr. Mechanic employed. As the rating in question involves scheduled impairment, the ALJ finds that Dr. Higginbotham's opinions concerning sensory impairment of the upper extremity are not subject to the clear and convincing burden of proof to be overcome. Here, a preponderance of the persuasive evidence demonstrates that the sensory rating methodology used by Dr. Higginbotham actually rated bodily structures (spinal nerve roots) that were not injured to justify a impairment for an insensate skin graft. The ALJ is convinced that such approach is not supported by the AMA Guides and likely resulted in a rating that exceeded Claimant's actual impairment for sensory loss. The ALJ finds Dr. Higginbotham's opinion regarding impairment for sensory loss in the left upper extremity incorrect and adopts Dr. Mechanic's scheduled impairment rating of 8%.

58. Concerning Claimant's thoracic spine Dr. Ridings concluded that Claimant had no thoracic spine impairment. Dr. Ridings explained during his testimony that any symptoms Claimant has in his upper or mid-back on the left were explained by his shoulder injury and resulting shoulder girdle muscular pathology with residual impairment to the left shoulder, and were not specific to or indicative of any thoracic spine pathology or diagnosis. Dr. Ridings testified at hearing that Claimant's shoulder extremity rating would convert to a 5% whole-person impairment, and respondents accept that converted 5% impairment should the ALJ credit Dr. Ridings' opinion on impairment of Claimant's left shoulder. Because Claimant had normal thoracic muscle tone during the IME, Dr. Ridings did not find a Table 53 specific diagnosis, and therefore Dr. Ridings found claimant did not injure his thoracic spine which would entitle him to additional spinal impairment.

59. Upon careful review of the record, the ALJ finds documentation to support Dr. Higginbotham's decision to rate Claimant's thoracic problems. Dr. Lakin's physical exams revealed thoracic tenderness, most notably the right paraspinal muscles, from his first evaluation on August 28, 2013, through his last on April 30, 2014. Dr. Sparr diagnosed thoracic sprain/strain and mid thoracic facet dysfunction. The occupational therapist placed permanent restrictions on claimant of no crawling because of his upper and mid back tightness and pain. Although Dr. Lakin reported Claimant's thoracic complaints as well as objective findings throughout his treatment, he did not provide Claimant with an impairment rating for the thoracic spine. He did, however, adopt the restriction for crawling secondary to "mid back tightness."

60. With regard to Dr. Higginbotham's diagnosis of chronic thoracalgia with myofascial strain and pain involving the left infraspinatus, rhomboid, and trapezius musculature, Dr. Ridings explained that the rhomboid is between the scapula and the thoracic spine, that the trapezius muscle is a large muscle, and is between the shoulder blade and the spine (Ridings' Depo. pg. 55, l. 16 through pg. 56, l. 2). Dr. Sparr diagnosed Claimant with "mid thoracic facet dysfunction" as the result of tenderness in the mid and upper thoracic facets.

Dr. Ridings testified he disagreed with Dr. Sparr's turning the "tenderness" into a diagnosis (Ridings' Depo. pg. 57, l. 23 through pg. 58, l. 2). However, Dr. Ridings conceded that Dr. Sparr did diagnose Claimant with "mid thoracic facet dysfunction" (Dr. Ridings' Deposition transcript, pg. 57, ll. 20-25). Dr. Ridings testified that Dr. Lakin's August 28, 2013, finding of *tight* thoracic spine paraspinal musculature is an objective finding, not a subjective complaint (Depo., pg.55, ll. 11-21). Dr. Ridings stated that on his exam, Claimant did not have increased myofascial tone in the thoracic paraspinals when relaxed (however, he did not comment on Claimant's tone when not relaxed). He opined that, therefore, Claimant "does not have 'rigidity' and does not qualify in my opinion for a Table 53, II-B rating. . . Hence, I disagree with rating the thoracic spine as Dr. Higgenbotham did."

61. Based on a totality of the evidence, the DIME's rating of Claimant's thoracic spine was within his discretion. The ALJ finds the various opinions of Drs. Lakin, the two opinions of Dr. Ridings, and Dr. Machanic to constitute a mere difference of opinion as to whether Claimant's thoracic complaints and objective findings should be rated. On the day of Dr. Higginbotham's DIME, he found both subjective and objective evidence of a thoracalgia, which comports with the thoracic complaints and findings throughout Claimant's treatment history. The difference of opinions between Claimant's treating physician and the parties' independent medical examiners do not rise to the level of clear and convincing evidence that is required to overcome Dr. Higginbotham's opinion as the DIME physician. Respondents have failed to meet their burden of proving, by clear and convincing evidence, that Dr. Higginbotham's opinion concerning Claimant's thoracic permanent medical impairment is highly probably incorrect.

62. Dr. Ridings testified that he did not believe Claimant's cognitive complaints were as severe as portrayed. He questioned Claimant's credibility noting as follows:

> Multiple cognitive symptoms out of proportion to the remainder of the patient's history. Specifically, the patient's contention that he cannot remember anything from one day before the present and cannot easily perform even household activities of daily living due to the severity of his memory impairment is entirely inconsistent with his level of functioning on neuropsychiatric testing discussed above. It is also not consistent with the level of function he demonstrated during history taking today. The neuropsychologist who evaluated him anticipated that he would be able to return to work requiring only modestly increased time to perform some activities. This is dramatically different than the patient's stated level of function.

Dr. Ridings felt find that Dr. Hopkins' extensive, researched, tested, accepted, and established neuropsychiatric testing was the best indicator of Claimant's permanent impairment for episodic neurologic disorders, not claimant's subjective complaints. Given the results of that testing Dr. Ridings assigned 5% whole-person for Claimant's ongoing cognitive symptoms.

63. Section 4.1b The Brain of the AMA Guides, at page 104, states:

> More than one category of impairment may result from brain disorders.

> In such cases the various degrees of impairment from the several categories are not added or combined, but the largest value, or greatest percentage of the seven categories of impairment, is used to represent the impairment for all of the types.

Dr. Machanic provided impairment ratings for claimant's headaches (8%), speech (8%), sleep (6%), and cognitive deficits (15%) pursuant to Table1, pg.109: episodic neurological disorders. He testified that, under the *AMA Guides*, Table 1, page 109, the rating physician looks at all potential impairments, and chooses the highest of them as the one impairment rating, which in this case is the 15% for cognitive deficits (Dr. Machanic's 6/8/15 Depo., pg. 5, ll.4-9). Dr. Mechanic's opinions comport with those of Dr. Higginbotham. Even Dr. Ridings agrees that Claimant is entitled to impairment for his cognitive disorder; he simply disagrees as to the extent of that impairment. Such professional differences of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Higginbotham's opinions as the Division IME physician.

64. Dr. Mechanic testified that Claimant's scars should be rated under the AMA Guides because widespread area of previous skin grafting and previous burns," are "typically rated" (Dr. Machanic's 6/18/15 Depo., pg. 22, l. 14 through pg. 23, l. 9). He could find no rationale in the *AMA Guides* which would leave disfigurement out because the scars are impairing although he did not explain how Claimant's scar was impairing. Based upon the evidence presented, the ALJ finds that Claimant produced insufficient evidence to establish that Dr. Higginbotham erred for failing to rate Claimant's scarring. While Claimant's scar may be disfiguring, the evidence fails to establish that the scarring impairs any bodily function or limits Claimant's ability to move joints outside of the elbow and shoulder which were appropriated rated for range of motion loss. Consequently, the ALJ finds that Claimant has failed to prove that it is highly probable that Dr. Higginbotham's decision not to rate Claimant's scarring is incorrect.

65. Based upon the evidence presented, the ALJ is not convinced that Dr. Higginbotham erred when he elected not to rate Claimant's lumbar spine as did Dr. Mechanic. The totality of the evidentiary record fails to support a rating for the lumbar spine.

66. After placing Claimant at maximum medical improvement on April 30, 2014, Dr. Lakin prescribed medical maintenance care as follows: purchase TENS unit for home use; 12-month gym membership; medical management with Dr. Caughfield for two (2) years to include medications and injections as warranted; follow up with Dr. Hopkins every three to four (3-4) months or six to eight (6-8) neuropsychological counseling sessions for two (2) years (C's Ex. 7, Bates 238). Respondents admitted to reasonable, necessary, and related medical treatment after MMI in their June 4, 2014, Final Admission of Liability. Claimant testified, however, that he did not receive any of Dr. Lakin's recommended treatment.

67. Based upon the evidence presented, Claimant has established the probable need for some treatment after MMI due to the work injury.

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

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.RS. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

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

Burden of *Proof*

D. A DIME physician's findings of causation, MMI and whole person impairment are binding on the parties unless overcome by “clear and convincing evidence.” *Section 8-42-107(8)(b)(III), C.R.S.*; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant’s overall medical impairment, MMI or the degree of whole person impairment, “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 enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. 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).

F. The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ. In deciding whether Claimant has met his burden of proof, the ALJ is empowered, "[t]o 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). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5. P3.d 385 (Colo.App.2000).

G. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). As found here, using cervical nerve roots not injured in the claim, and a "novel" methodology not found or supported by the *Guides*, is clear error as testified to by Dr. Mechanic and Ridings. As Dr. Machanic testified in part two of his deposition, this portion of Dr. Higginbotham's rating seeks to rate a condition that does not exist. According to Dr. Mechanic, "You can't rate Mr. Gibson using a cervical-root table because he doesn't have a pinched nerve in the neck." There is no anatomical correlation between claimant's left upper extremity sensory deficits secondary to his burn and subsequent skin graft and any cervical nerve root. Dr. Ridings also testified that this rating methodology of Dr. Higginbotham's was erroneous and, "Utter nonsense." Accordingly, the ALJ concludes that Respondents have established that Dr. Higginbotham's methodology in rating Claimant's scheduled sensory impairment was incorrect and his opinion in this regard is overcome. As found, the ALJ adopts Dr. Mechanic's opinion that Claimant sustained 8% scheduled impairment. Moreover, as found, this impairment is limited to the upper extremity.

H. Contrary to Respondents suggestion, the ALJ concludes that Dr. Higginbotham's

impairment rating for the thoracic spine and episodic neurologic discords is reliable, well-reasoned, and consistent with Claimant's medical history, medical treatment, diagnoses, impairments, and the *AMA Guides*. Based upon the evidence presented, the ALJ finds and concludes that Dr. Higginbotham accurately assessed and rated all pathologies causally related to this claim. As found, professional differences of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Higginbotham's opinions as the Division IME physician. Consequently, the ALJ concludes that Respondents have failed to prove that Dr. Higginbotham's opinions regarding thoracic spine and cognitive impairment are highly probably incorrect. Finally, concerning any request for a finding that Dr. Higginbotham erred in expressing his impairment related opinions because he did not rate Claimant's scar and/or lumbar spine, the ALJ is not convinced. Here, the records fails tom support any injury to the lumbar spine and Dr. Mechanic failed to explain any basis for his 5% disfigurement rating arbitrarily assigned in this case.

I. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

J. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit at this time, and respondents remain free to contest the reasonable necessity of any future treatment, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Claimant has made such a showing in this case. Here, the persuasive evidence establishes ongoing cervical, thoracic, shoulder and elbow pain which will likely be responsive to additional treatment including therapy, a TENS Unit and a gym membership. Moreover, the ALJ is convinced that Claimant continues to suffer from the effects of neuro-cognitive symptoms which would likely be ameliorated by additional neuropsychological counseling. Consequently, Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. *Section 8-42-101 (1) (a), C.R.S.*

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Higginbotham's opinions regarding

permanent impairment of the thoracic spine and episodic neurologic disorders is denied and dismissed.

2. Respondents' request to set aside Dr. Higginbotham's opinion regarding sensory impairment for the left upper extremity is granted. The 11% scheduled impairment of the left upper extremity assigned by Dr. Higginbotham is set aside and replaced by the 8% scheduled impairment as expressed by Dr. Machanic.

3. Claimant's true impairment ratings causally related to this claim's injury are as follows: 14% impairment of the cervical spine as a whole-person rating; 5% impairment of the thoracic spine as a whole person; 15% for complex integrated cerebral function disturbances as a whole-person rating; 3% impairment of the left extremity at the elbow on the schedule of impairments associated with range of motion loss; 8% impairment of the left upper extremity for peripheral sensory disturbance on the schedule of impairments; and 5% whole-person impairment for claimant's left shoulder condition.

4. Respondents shall provide all reasonable necessary and related treatment to relieve the Claimant from the effects of his work-related injury. Respondents remain free to challenge any future request for treatment on the grounds that it is not reasonable, unnecessary or unrelated to Claimant's industrial injury.

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

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

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

DATED: September 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

1. Whether Respondent has established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability (TTD) benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

2. Whether Claimant has made a "proper showing" for a change of physician pursuant to §8-43-404(5)(a), C.R.S.

STIPULATION

The determination of whether Claimant is a candidate for left shoulder surgery will be resolved through the Division Independent Medical Examination (DIME) process.

FINDINGS OF FACT

1. Employer is a large supermarket. Claimant worked as a Deli Clerk for Employer. On March 31, 2013 Claimant suffered an admitted industrial injury to her left shoulder. The injury constituted an aggravation of her pre-existing acriomioclavicular arthritis and other degenerative conditions.

2. Employer referred Claimant for medical treatment to Concentra Medical Centers. Claimant stated that she has been receiving treatment from Concentra and is now under the care of Eric Tentori, M.D. He has referred Claimant to Orthopedic Specialist Eric McCarty, M.D. for a consultation.

3. Claimant testified that Concentra is "doing nothing for her" besides prescribing medications. She is awaiting possible left shoulder surgery. Claimant explained that she is dissatisfied with Concentra's care and her lack of progress. Nevertheless, she acknowledged that she is pleased with the care she has received from Dr. McCarty.

4. Claimant returned to work for Employer after her injury in a modified duty capacity. She typically worked from 10:30 a.m. until 7:00 p.m. Claimant's work restrictions included no lifting, pushing or pulling in excess of 20 pounds.

5. In early February 2015 Claimant was transferred to the night shift. Her work hours extended from 2:00 a.m. until 10:30 a.m. Claimant's Store Manager Robert Dicroce testified that Claimant was moved to the night shift to determine whether reduced duties consisting mostly of food preparation might improve her modified work performance.

6. On February 10-11, 2015 Mr. Dicroce requested Employer's Security Department to obtain video footage of Claimant working during the night shift. He explained that he requested the security video to determine whether Claimant was exceeding her restrictions while performing her job duties. After obtaining the video footage the security team alerted Mr. Dicroce that Claimant engaged in several unsanitary practices while performing her modified job duties.

7. Video footage revealed Claimant working on the evening of February 10, 2015. One clip showed Claimant handling what appeared to be cardboard boxes and other materials. She then used the same gloves to reach in and retrieve raw lettuce from a bag that was used to make a salad. Another clip showed Claimant working with a tortilla wrapped sandwich. She was folding food into the wrap. While she was folding the wrap, she touched her face and went back to finishing preparation of the wrap. Another clip revealed Claimant either blowing her nose or wiping a paper towel across her face. She then used the same paper towel to wipe off the meat slicer and counter. Claimant also acknowledged that she did not remove her apron when taking breaks.

8. Mr. Dicroce testified that Employer's Safety and Sanitation Policies and Procedures were distributed to every employee. Mr. Dicroce's administrative assistant also furnished employees with updates, changes and amendments to the Policies and Procedures. The Policies and Procedures included directives for employees to change gloves when alternating tasks and touching raw food. The Policies and Procedures also specified that employees were to avoid coughing or sneezing when handling food. Moreover, employees were not to touch the face, nose, mouth or hair when handling food. Finally, the Policies and Procedures specified that aprons were to be removed before leaving the perishable department to go to lunch or on breaks.

9. On February 18, 2015 Employer confronted Claimant about her unsanitary practices. Claimant was suspended after the meeting.

10. On February 25, 2015 Employer specified the unsanitary practices in a written document or "Behavioral Notice." The Notice specified numerous food safety and personnel hygiene concerns. The document detailed that Claimant committed numerous violations of Employer's Sanitary and Safety Policies on February 10-11, 2015 including the failure to change gloves when alternating tasks and touching her face while cleaning. Employer terminated Claimant at the meeting. Mr. Dicroce testified that Claimant's egregious violations constituted grounds for immediate termination of employment.

11. Claimant testified that when she was switched to the 2:00 a.m. until 10:30 a.m. night shift she was tired and fuzzy from her medications and lack of sleep. She maintained that her actions did not justify an immediate termination. Claimant remarked that she believed her termination constituted retaliation for her Worker's Compensation claim. Finally, she explained that her current Concentra physicians are not helping to improve her condition and are only prescribing medications.

12. Claimant has not worked subsequent to her termination by Employer. She continues to receive medical treatment at Concentra but has not yet reached Maximum Medical Improvement (MMI).

13. Respondent has established that it is more probably true than not that Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment under the termination statutes. Video footage revealed Claimant working on the evening of February 10, 2015. One clip showed the Claimant handling what appeared to be cardboard boxes and other materials. She then used the same gloves to reach in and retrieve raw lettuce from a bag that was used to make a salad. Another clip showed Claimant working with a tortilla wrapped sandwich. She was folding food into the wrap. While she was folding the wrap, she touched her face and went back to finishing preparation of the wrap. Another clip revealed Claimant either blowing her nose or wiping a paper towel across her face. She then used the same paper towel to wipe off the meat slicer and counter. Claimant also acknowledged that she did not remove her apron when taking breaks. Employer's Policies and Procedures included directives for employees to change gloves when alternating tasks and when touching raw food. The Policies and Procedures also specified that employees were to avoid coughing or sneezing when handling food. Moreover, employees were not to touch the face, nose, mouth or hair when handling food. Finally, the Policies and Procedures noted that aprons were to be removed before leaving the perishable department to go to lunch or on breaks. On February 25, 2015 Claimant was terminated for numerous violations of Employer's Sanitary and Safety Policies including the failure to change gloves when alternating tasks and touching her face while cleaning. In contrast, Claimant explained that her actions did not justify immediate termination and constituted retaliation for filing a Workers' Compensation claim. However, the record reveals numerous sanitary and safety violations in contravention of Employer's documented Policies and Procedures. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment.

14. Claimant has failed to make a proper showing that she is entitled to a change of physician from Concentra. Claimant stated that she is dissatisfied with Concentra's care and her lack of progress. However, she acknowledged that she is pleased with the care she has received from Orthopedic Specialist Dr. McCarty. Furthermore, the record reveals that the parties are awaiting a DIME determination about whether Claimant is a surgical candidate. Accordingly, Claimant's medical circumstances do not warrant a change of physician from Concentra.

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).

Responsible for Termination

4. Respondent asserts that Claimant is precluded from receiving temporary disability benefits because she was responsible for her termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondent must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondent has established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment under the termination statutes. Video footage revealed Claimant working on the evening of February 10, 2015. One clip showed the Claimant handling what appeared to be cardboard boxes and other

materials. She then used the same gloves to reach in and retrieve raw lettuce from a bag that was used to make a salad. Another clip showed Claimant working with a tortilla wrapped sandwich. She was folding food into the wrap. While she was folding the wrap, she touched her face and went back to finishing preparation of the wrap. Another clip revealed Claimant either blowing her nose or wiping a paper towel across her face. She then used the same paper towel to wipe off the meat slicer and counter. Claimant also acknowledged that she did not remove her apron when taking breaks. Employer's Policies and Procedures included directives for employees to change gloves when alternating tasks and when touching raw food. The Policies and Procedures also specified that employees were to avoid coughing or sneezing when handling food. Moreover, employees were not to touch the face, nose, mouth or hair when handling food. Finally, the Policies and Procedures noted that aprons were to be removed before leaving the perishable department to go to lunch or on breaks. On February 25, 2015 Claimant was terminated for numerous violations of Employer's Sanitary and Safety Policies including the failure to change gloves when alternating tasks and touching her face while cleaning. In contrast, Claimant explained that her actions did not justify immediate termination and constituted retaliation for filing a Workers' Compensation claim. However, the record reveals numerous sanitary and safety violations in contravention of Employer's documented Policies and Procedures. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment.

Change of Physician

6. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

7. As found, Claimant has failed to make a proper showing that she is entitled to a change of physician from Concentra. Claimant stated that she is dissatisfied with Concentra's care and her lack of progress. However, she acknowledged that she is pleased with the care she has received from Orthopedic Specialist Dr. McCarty. Furthermore, the record reveals that the parties are awaiting a DIME determination about whether Claimant is a surgical candidate. Accordingly,

Claimant's medical circumstances do not warrant a change of physician from Concentra.

ORDER

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

1. Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment.

2. Claimant is not entitled to a change of physician.

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: September 29, 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

- The issues presented for determination were whether Claimant established by a preponderance of the evidence that the proposed carpal tunnel release surgery for his left wrist and the proposed massage therapy treatments were reasonable and necessary, as well as related to the industrial injury.

PROCEDURAL STATUS

Claimant initially filed an Application for Hearing (left carpal release) on February 27, 2015 to which Respondents filed a Response to Application for Hearing on March 30, 2015 and an Amended Response to Application for Hearing on April 8, 2015. Claimant filed a subsequent Application for Hearing (massage therapy) on March 3, 2015 to which Respondents filed a Response to Application for Hearing on April 10, 2015.

The medical benefits issues raised by the foregoing Applications and Responses to Applications for Hearing were consolidated by the Order (dated April 10, 2015), which granted the Unopposed Motion to Consolidate Hearings.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant's suffered an admitted industrial injury on August 2, 2013 while working as a window washer for Employer. He has worked for the Employer for nineteen (19) years. Claimant was travelling in an employee shuttle bus when the driver stopped suddenly, slamming on the brakes. He was holding onto a bar with his right arm and upon impact braced himself with his left arm. His body was moved forward as a result of the vehicle stopping.

2. Claimant described the force as "dramatic" and he almost fell to the ground. Another passenger fell into him and Claimant testified that his body created a "net" when this person fell into him, however, he did not fall to the ground. Claimant felt pain in his back, neck and shoulder, as well as hand tingling and numbness.

3. Claimant testified that before the injury he did not have symptoms or pain in his left wrist. Before the injury he did not require any medical treatment for his left wrist.

4. Claimant initially treated with Dr. Harvey on August 13, 2013. He was seen in follow-up on August 21, 2013 at which time the assessment was neck pain, shoulder pain and thoracic strain. No overhead work, as well as continued ibuprofen and ice were recommended.

5. A cervical CT scan was done on August 22, 2013 which showed degenerative disc and joint changes with moderate dural sac narrowing at C5-6 and moderate left foraminal narrowing at C6-7. Disc space narrowing, as well as disc bulging and protrusion were noted at those levels. Claimant was given a 10 lb lifting restriction.

6. Claimant was evaluated by Kristin Mason, M.D. on October 17, 2013[1], who noted that Claimant was complaining of neck pain and bilateral upper extremity numbness and tingling. Claimant reported that he would awaken with his hands numb involving all fingers. Positive Tinel's sign was noted over the median nerves at the wrists and ulnar nerves at the elbows. Dr. Mason's assessment was cervical strain with some findings of C6 radiculopathy, as well as bilateral upper extremity parasthesias. She recommended MRI-s of the neck and shoulder as well as electrodiagnostic studies.

7. A cervical MRI done on October 31, 2013 revealed degenerative disc and joint changes with moderate dural sac indentation, foraminal narrowing, mild on the right at C5-6 and moderate on the left at C6. The left shoulder arthrogram done on the same day showed supraspinatus and infraspinatus tendinosis with large full-thickness tear of the supraspinatus. An anterior quadrant labral tear with involvement of the biceps anchor was also documented.

8. EMG studies were done on Claimant's upper extremities on November 11, 2013. Dr. Mason's impression was bilateral median mononueropathy at the wrist right>left and no clear-cut radiculopathy. Claimant saw Dr. Mason on December 2, 2013, who noted that the supraspinatus tear would not improve without surgery.

9. Claimant was evaluated by Armodios Hatzidakis, M.D. on November 26, 2013, noted left shoulder traumatic rotator cuff tear with long head of biceps tendinitis and subacromial impingement. The exam showed tenderness and reduced range of motion in the shoulder. Surgery was discussed.

10. Claimant saw Dr. Mason in follow-up on January 13, 2014 and her assessment was cervical strain with mild C6 radiculitis, bilateral median nerve dysfunction (likely acute), thoracic strain and rotator cuff tear. He underwent shoulder surgery on his left shoulder on January 21, 2014, which was performed by Dr. Hatzidakis.

11. On February 3, 2014, Dr. Mason examined the Claimant after the surgery. He continued to have mild left-sided sensory issues which were unchanged. Dr. Mason saw Claimant on May 5, 2014 at which time he complained of pain and tingling in his

[1] The findings from the initial evaluation by Dr. Mason (10/13/13) were summarized in Dr. Pitzer's report, dated 9/25/14 [Ex. B, p. 004].

hands, particularly bothersome at night. Median nerve sensory loss persisted. He was referred to Dr. Mordick.

12. Claimant was evaluated by Thomas Mordick, II, M.D. on May 13, 2014. Claimant complained of numbness and tingling mostly in the long, ring and small fingers on the right hand. He said at times his entire hand goes numb. Dr. Mordick noted that EMG studies showed carpal tunnel syndrome ("CTS"), with the sensory latencies prolonged right (5.2) and minimally prolonged left. Diminished sensation in the median and ulnar nerve distribution was noted upon examination. Dr. Mordick felt that the symptoms would "seem to be more consistent" with Claimant's cervical root compression diagnosis. Claimant was scheduled to have an injection and if the symptoms improved, they would monitor. If the symptoms did not, they would consider CTS release. Dr. Mordick also noted that given the nature of his employment as a window cleaner with heavy manual tasks, this would be appropriately treated as a work-related injury.

13. On June 3, 2014, Claimant returned to Dr. Mordick after the neck injection. On physical examination, Dr. Mordick noted continued diminished sensation in the median ulnar nerve distribution right compared to left. Dr. Mordick's assessment was CTS and possible neck cervical root compression. Claimant wished to proceed with the carpal tunnel release on the right.

14. On July 2, 2014, Claimant underwent a right carpal tunnel release that was performed by Dr. Mordick. He was examined by Dr. Mason on July 7, 2014 and some improvement in his numbness was reported by Claimant, who was also to begin therapy.

15. On August 12, 2014 (approximately six weeks post-surgery), Dr. Mordick saw the Claimant and noted no unusual scar formation or tenderness. There was excellent range of motion in the wrist and fingers. Claimant wanted to proceed with the surgery on his left hand.

16. Dr. Mordick's office requested authorization for left carpal tunnel release surgery on August 13, 2014. [Exhibit 8, page 000081].

17. On August 26, 2014, Jonathon Race M.D. issued a letter on behalf Broadspire as the agent for the insurer which evaluated the request for authorization of left carpal tunnel treatment. Dr. Race recommended that the treatment not be certified pursuant to the Colorado Medical Treatment Guidelines ("Guidelines"). Dr. Race opined that Claimant had not received

18. Claimant underwent Osteopathic Manipulative Treatment ("OMT") on September 2, 2014, which provided by Joshua Krembs, D.O. This treatment included myofascial release and trigger point injections. Claimant reported pain relief after the injections.

19. Dr. Mason sent a letter on September 8, 2014 in which she responded to the denial of the left carpal tunnel release. Dr. Mason noted that Claimant had

extensive conservative care, including splinting and anti-inflammatory medications. She opined that Claimant had failed conservative treatment and it would be in his best interest to proceed with the carpal tunnel release.

20. Neil Pitzer, M.D. examined the Claimant on September 25, 2014 at the request of Respondents. Dr. Pitzer is an expert in physical medicine and rehabilitation. He has experience treating peripheral nerve injuries for over 25 years at the University of Colorado Hospital.

21. After reviewing Claimant's treatment records, Dr. Pitzer noted mild restrictions in Claimant's cervical motion in all planes with complaints of pain. Wrist motion also was essentially normal, but some pain with extension in the right was found. Sensory exam showed decreased light touch and pinprick in the median radial, ulnar, dorsal cutaneous ulnar and lateral antebrachial cutaneous distribution bilaterally. Strength testing showed some mild weakness of APB strength bilaterally, but also weakness of flexor pollicis longus strength bilaterally and finger abduction bilaterally. Tinel's was positive over the carpal tunnel, cubital tunnel bilaterally as well as over the mid forearm not over a peripheral nerve distribution.

22. Dr. Pitzer noted that Claimant related that he had bilateral hand and arm numbness immediately occurring after the injury. Dr. Pitzer stated that the initial reports tended to refute this, as Claimant did not have numbness on exam or complaints of numbness immediately post injury, but had cervical and thoracic pain. Dr. Pitzer did not have the initial EMG available to review, but opined that Claimant's carpal tunnel syndrome was not related to the strain injury in the neck and shoulders. He recommended against authorization through worker's compensation of any further surgeries or EMG studies. He also opined that the right CTS was not related to Claimant's work injury.

23. Claimant underwent an epidural steroid injection at C6-7 on September 30, 2014, which was administered by Nicholas Olsen, D.O.

24. Dr. Mason saw Claimant for a follow-up evaluation on October 6, 2014. On physical exam, he had weakness of his APB on the left and medial distribution sensory disturbance. Positive Tinel's sign was noted. Dr. Mason reviewed the IME report from Dr. Pitzer and respectfully disagreed with its conclusions. Claimant's EMG in 11/13 was negative for polynueropathy. He was described as having classic carpal tunnel symptoms. Dr. Mason noted that Claimant may have had subclinical carpal tunnel that was "aggravated" by the wrist strain.

25. Claimant was examined by Dr. Mason on October 20, 2014 at which time numbness and tingling was noted in the median distribution of the left hand Dr. Mason discussed "double crush syndrome" and how he has both radiculopathy and CTS, which can each worsen the other. As part of her assessment of left CTS, Dr. Mason noted that it was clearly related in light of the C6 radiculitis, which has a well-known association in the medical literature.

26. Dr. Mason next examined Claimant on November 10, 2014. Claimant's right hand was described as doing reasonably well, with the numbness in his left hand getting more prominent.

27. A supplemental report dated November 10, 2014 was issued by Dr. Pitzer. Dr. Pitzer reviewed a videotape of Clamant on a riding lawnmower and using a pushmower. Dr. Pitzer noted that Claimant was able to walk with a normal gait without difficulty and it appeared he could return to work. Dr. Pitzer reiterated his opinion that the CTS and peripheral nerve compressions are not related to his nerve injury of 8-2-13.

28. Claimant was seen in follow-up by Dr. Mason on December 8, 2014, who had cleared him to return to work full-duty. Claimant reported that the massage therapy was helpful with the muscle component of pain and felt he was getting stronger. Dr. Mason anticipated that Claimant would probably placed at MMI for the shoulder in January, the left carpal tunnel issue remained pending.

29. Dr. Mason saw Claimant on January 5, 2015 and noted that his left thumb was weaker. He had a positive Tinel's with median sensory loss. Claimant report the numbness in the left hand was getting worse.

30. Dr. Mason examined Claimant on January 26, 2015 and it was noted that Dr. Hatzidakis had released him to continue strengthening. Claimant was continuing massage therapy which was helping his neck pain. Claimant reported some increased numbness and Dr. Mason recommended repeat EMG studies to look for change.

31. The repeat EMG studies were done on February 16, 2015. The summary documented differential slowing for the median nerve. Dr. Mason's impression was unchanged "mild" left CTS and improved right CTS.

32. John Obermiller, M.D. issued a report on March 4, 2015 evaluating the treatment request for four (4) massage therapy visits every other week as an outpatient. He recommended that the request be non-certified, as the guidelines would support a maximum duration of two months of massage therapy.

33. Claimant returned to Dr. Mason on March 9, 2015, at which time she noted weakness in the left thumb with median sensory loss and a positive Tinel's and median compression test. The results of the EMG were discussed and Dr. Mason noted that the left CTS was neither getting better nor worse.

34. Dr. Obermiller authored a report, dated March 26, 2015 in which he evaluated the request for 8 Physical Therapy 1-2/week x4 weeks for Claimant's left hand/wrist and recommended these be non-certified. Dr. Obermiller stated that the provided medical records did not indicate that the Claimant had failed to respond to a home exercise program for the treatment of the left had complaints for this case, which is approximately 1½ years out from the date of injury. The amount of physical therapy previously attended was not documented. Dr. Obermiller cited the Colorado Medical Treatment Guidelines Rule 17, Exhibit 5.

35. Dr. Mason examined Claimant on April 6, 2015 at which time he reported his shoulder was doing well. The treatment with Dr. Krembs was described as beneficial. Claimant's left hand continued to have numbness at night. Claimant continued to have weakness of the APB on the left with median sensory loss and a positive Tinel's, as well as positive median compression test. Dr. Mason's assessment was resolving left C6 radiculitis with myofascial pain which was responding to OMT; status post right carpal tunnel release with some ulnar neuropathy at the elbow; left rotator cuff repair with biceps tenodesis and subacromial decompression, doing well; left CTS. The plan articulated by Dr. Mason was continue the OMT and the tramadol (p.r.n.). Dr. Mason did not think that Claimant needed further PT, as the rotator cuff strength was good.

36. A General Admission of Liability was filed on or about May 17, 2015, admitting for medical and temporary total disability benefits.

37. Dr. Pitzer issued a written report, dated 6-25-14 (which appears to be a typographical error since it refers to Dr. Mason's 4-6-15 note and his addendum of 11-10-14). Dr. Pitzer opined that he did not feel any further physical therapy or massage therapy for Claimant's work injuries was medically indicated.

38. Claimant testified at hearing that he wanted the carpal tunnel release for his left wrist because he believed it would relieve his symptoms.

CONCLUSIONS OF LAW

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

General

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1). 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. 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).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2007; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Medical Benefits

A Respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated both the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra*.

A. Osteopathic Manipulative Treatment

Respondents contend that additional Osteopathic Manipulative Treatment ("OMT") is neither reasonable nor necessary. In support of this argument, Respondents submitted the reports of Dr. Obermiller and Dr. Pitzer. In his March 4, 2015 report, Dr. Obermiller reviewed the request for authorization of four (4) massage therapy visits every other week as an outpatient. He recommended that this request be non-certified, as the Guidelines would support a maximum duration of two months of massage therapy. The ALJ is not persuaded by this opinion, as Dr. Obermiller did not know the mechanism of injury, nor did he have information as to the amount of previous massage therapy for this year. In addition, there is no evidence that Dr. Obermiller examined Claimant, nor he did not have the benefit of Dr. Mason's April 6th report which documented Claimant's improvement related to this therapy.

Respondents also relied upon the opinion of Dr. Pitzer who evaluated Mr. Zarate on September 25, 2014. Dr. Pitzer issued a supplemental report on June 25, 2015 in which he concluded that no further PT or massage therapy was medically indicated for his work injuries. Dr. Pitzer opined that the proposed treatment was "not consistent with Worker's Compensation treatment guidelines", but did not cite a specific section of the treatment guidelines, including any of the applicable appendices to the W.C.R.P. Dr. Pitzer's report also did not address the efficacy of the manipulation treatments and

injections provided by Dr. Krembs. In fact, there was no discussion by Dr. Pitzer regarding Claimant's response to this treatment.

Claimant's treating physician (Dr. Mason) recommended continued OMT and her April 6, 2015 report documented improvement in Claimant's symptoms. The ALJ is persuaded that Dr. Mason is in the best position to provide an opinion regarding the necessity of the proposed treatment. Specifically, Claimant reported symptom relief to Dr. Mason. (See for example, reports dated 12/8/14, page 00046; 1/26/15, page 000052). Claimant's testimony that the treatment was effective and provided symptom relief is also persuasive.

The ALJ concludes that the evidence has shown that the proposed OMT relieves Claimant's symptoms. Therefore, the ALJ finds that Claimant has sustained his burden of proof with regard to the Osteopathic Manipulative Treatment. Said treatment is reasonable and necessary to relieve the effects of the August 2, 2013 injury. Respondents are required to provide such treatment and are therefore ordered to provide the OMT as recommended by Dr. Mason.

B. Left Carpal Tunnel Release

The ALJ first considered Claimant's injury, course of treatment and the opinions of the various physicians in conjunction with the parties' contentions with regard to the proposed carpal tunnel surgery. Claimant contended that the proposed CTS release for the left wrist is reasonable and necessary, as the medical records supported the need for said treatment. In the record, bilateral hand complaints were documented during the acute phase of the injury, although Claimant apparently did not report symptoms when he first received treatment after August 2, 2013. (The ALJ notes that the records for Claimant's initial treatment during this timeframe were not admitted into evidence, but he has utilized Dr. Pitzer's treatment summary.)

In Dr. Mason's initial evaluation of October 17, 2013, she documented bilateral hand complaints, including numbness and tingling. A positive Tinel's sign over the median nerves was also noted. Dr. Mason's follow-up evaluations also documented positive findings related to CTS, including:

- 11/11/13-EMG: bilateral median mononueropathy.
- 5/5/14-Symptoms: numbness and tingling; Assessment: Bilateral persistent medial nerve dysfunction.
- 6/2/14-Bilateral carpal tunnel syndrome (epidural steroid injection did not affect numbness and tingling).
- 6/23/14-Bilateral carpal tunnel syndrome.
- 7/7/14-Assessment: Status post right carpal tunnel release with left carpal tunnel syndrome.

- 7/21/14-Assessment: Status post right carpal tunnel release with left carpal tunnel syndrome; Improvement noted on right after surgery.

- 8/25/14-Assessment: left carpal tunnel syndrome awaiting scheduling.

- 9/8/14-After the denial of left carpal tunnel release, Dr. Mason noted that Claimant had extensive conservative care, including splinting and anti-inflammatory medications.

- 9/15/14-Symptoms: more numbness down the left arm; Assessment: left carpal tunnel syndrome awaiting scheduling for surgery.

- 10/6/14-Assessment: left carpal tunnel syndrome. Dr. Mason disagreed with Dr. Pitzer's conclusions, noting that Claimant's EMG was negative for polyneuropathy and he had "classic" carpal tunnel symptoms on the left.

- 10/20/14-Assessment: left carpal tunnel syndrome; Dr. Mason opined "double crush syndrome".

- 11/10/14-Symptoms: numbness in left hand more prominent.

- 1/5/15- Positive Tinel's with median sensory loss.

- 2/6/15-Repeat EMG-mild CTS noted.

- 3/9/15-Weakness in left thumb, median sensory loss and positive Tinel's sign.

- 4/6/15-Weakness of the APB on the left, median sensory loss and positive Tinel's sign.

Dr. Mordick's reports also supported the conclusion that the proposed CTS release is reasonable and necessary given the circumstances of this case. Dr. Mordick initially focused on the cervical root compression diagnosis, noting if there was no symptom relief from the injection, they would need to consider a carpal tunnel release. When Claimant's symptoms did not abate, he recommended the carpal tunnel release. As part of his opinion, Dr. Mordick also noted that because of the nature of Claimant's employment this would be an appropriately treated as a work-related injury.

Under this rationale, Dr. Mordick performed with the carpal tunnel release on Claimant's right hand. He noted in his July 7, 2014 report that he would proceed with the procedure on the left side once Claimant had recovered. The inference the ALJ draws from this report is Dr. Mordick believed this treatment to be reasonable and necessary.

Respondents argued that the need for the proposed CTS release was not caused by the accident or related to it. Respondents rely upon Dr. Pitzer's opinion when he stated that Claimant's CTS was not related to the strain injury in the neck and

shoulders. Further Dr. Pitzer opined though Mr. Zarate was holding onto bars, "this would not cause trauma to the nerves requiring decompression". Since the industrial injury did not cause the CTS, Respondents argued that the proposed treatment would not be reasonable.

Dr. Pitzer also noted that Claimant did not meet the DOWC Guidelines for development of CTS related to trauma, but did not specify what guidelines upon which he had based that conclusion. Dr. Pitzer recommended against authorization of any further treatment through worker's compensation. The ALJ has given weight to Dr. Pitzer's opinion, given his expertise in the field of Physical Medicine Rehabilitation and 25 years of experience treating patients at University of Colorado Hospital.

Respondents also argued that the proposed left carpal tunnel release is not reasonable, nor is it necessary. In support, Respondents tendered the August 26, 2014 report of Dr. Race, whose conclusion was that a left CTS release was not indicated under the Medical Treatment Guidelines. In that report, Dr. Race states:

"The guidelines indicate carpal tunnel release would be supported in cases with motor latency of less than 5 miliseconds after failures of lower levels of care including job alterations. The electrodiagnostic testing provided for in review indicated the left wrist median and motor latency was 3.5 miliseconds which was less that the guideline indicated requirement. Dr. Race also noted "the records do not reflect failure of lower levels of care such as oral medications, splinting, physical therapy, or a steroid injection of the carpal tunnel". More particularly, Dr. Race said that the Guidelines indicated carpal tunnel release would be supported in cases with motor latency of less than 5 miliseconds after failures of lower levels of care including job alterations. The electrodiagnostic testing provided for in review indicated the left wrist median and motor latency was 3.5 miliseconds which was less that the Guideline indicated requirement. Dr. Race also noted "the records do not reflect failure of lower levels of care such as oral medications, splinting, physical therapy, or a steroid injection of the carpal tunnel".

The ALJ notes that the analysis done by Dr. Race was based upon his review of medical records, as there is no evidence that he examined Claimant. The rationale put forward by Dr. Race was that Claimant had not received conservative treatment modalities for his CTS. However, this was refuted by Dr. Mason. In this regard, the ALJ finds Dr. Mason to be credible on the subject of the treatment Claimant received, since she has overseen his treatment since October 2013. Dr. Mason noted that Claimant had received the lower levels of care, although the medical records admitted at hearing do not show whether a steroid injection of the carpal tunnel was tried. The 1.5 millisecond difference is dispositive of this question as the Guidelines describe this testing as a range. The ALJ is not persuaded by Dr. Race's conclusion that a CTS release is not indicated under the Guidelines.

The ALJ next considered the broader question of whether the Medical Treatment Guidelines ("Guidelines") applied to the requested CTS release. The Guidelines are contained in W.C. Rule of Procedure 17-2(A), 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers'

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

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria). However, an ALJ is not required to award or deny medical benefits based on the Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award of deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014)

W.C.R.P. 17-5(C) provides in relevant part:

> "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9."

The ALJ notes that the Guidelines do not direct address the factual scenario presented by this case; namely where an underlying condition (CTS) is present and is then potentially aggravated by a traumatic injury. Accordingly, the Guidelines do not definitively assist the ALJ in determining whether a CTS release is reasonable and necessary.

This is a case of diametrically opposed medical opinions. In the particular, the two ATP-s (Dr. Mason and Dr. Mordick) who support the request for surgery are pitted against the opinions of an IME physician (Dr. Pitzer), as well as the physician who performed a record review (Dr. Race.), who state it should be denied. The ALJ is persuaded by opinions expressed by the authorized treating physicians, particularly those of Dr. Mason, who has treated Claimant throughout the pendency of the claim. These opinions persuade the ALJ that Claimant's need for the CTS release was caused by the industrial injury and that the proposed treatment is reasonable and necessary.

First, the medical evidence admitted at hearing demonstrates Claimant had objective findings consistent with CTS and these were consistent throughout his course of treatment. In fact, Dr. Mason noted symptoms of bilateral upper extremity numbness

and tingling as early as October 17, 2013, which was two months post-injury. Positive Tinel's sign was noted over the median nerves at the wrists and ulnar nerves at the elbows. These objective findings were noted consistently throughout Dr. Mason's records. Dr. Mason's assessment at that time included bilateral upper extremity parasthesias. Dr. Mason described Claimant's presentation as "classic" CTS. Furthermore, after specifically reviewing the Respondents' IME physician's opinion (Dr. Pitzer), Dr. Mason offered a credible explanation; namely, double crush syndrome, which was not refuted.

The CTS findings were supported by the EMG studies. When Dr. Pitzer examined Claimant on September 25, 2014, he did not have the EMG studies available for review. In this regard, the record is unclear whether Dr. Pitzer was ever provided with the EMG studies, as his supplemental reports of 11/10/14 [Ex. C] and 6/25/15 [Ex. G] do not contain any reference to the EMG studies. Dr. Pitzer felt that Claimant may well have peripheral polyneuropathy, as opposed to nerve trauma. However, in her 10/26/14 report, Dr. Mason noted that the EMG studies were negative for polyneuropathy. Dr. Pitzer did not comment or provide any additional information concerning polyneuropathy in his subsequent reports. The ALJ therefore is not persuaded that polyneuropathy explains Claimant's symptoms.

Second, there was objective evidence that Claimant had no symptoms prior to the subject accident. The ALJ notes that medical records related to a prior DIME with Dr. Scaer were provided to Dr. Pitzer and there was no reference to upper extremity symptoms. Claimant's testimony also confirmed that he had no symptoms of CTS prior to the subject injury.

Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997) . In this case, the evidence leads the ALJ to conclude that while Claimant may have had carpal tunnel syndrome as an underlying asymptomatic condition, it was the industrial injury of August 2, 2013 that caused his symptoms and the need for medical treatment.

Third, even though the precise factual circumstances are not covered by the Guidelines, Claimant's physical findings meet the Guidelines criteria for CTS treatment. In his physical examination of Claimant, Dr. Pitzer noted decreased light touch and pinprick in the median, radial, ulnar, dorsal cutaneous ulnar and lateral antebrachial cutaneous distribution bilaterally. Claimant's grip strength was symmetric, with some mild weakness of APB strength bilaterally. Tinel's was positive over the carpal tunnel. (These are positive findings for CTS under the Medical Treatment Guidelines.)

The ALJ concludes that Claimant has satisfied his burden of proof with regard to the need for CTS surgery on the left. Claimant requires said treatment as a result of the industrial injury and the proposed carpal tunnel release is reasonable and necessary.

ORDER

It is therefore ordered that:

1. The Insurer shall pay for the cost of the OMT, provided by Dr. Krembs and Dr. Zarou, as recommended by Dr. Mason.

2. The request for CTS release surgery on the left is found to be reasonable and necessary. Insurer shall authorize proposed CTS release surgery for the left wrist.

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: September 10, 2015

s/Timothy L. Nemechek

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for L4-L5 fusion surgery by Authorized Treating Physician (ATP) Chad Prusmack, M.D. is reasonable, necessary and causally related to her September 19, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 32 year old female who worked for Employer as a Restaurant Manager. On September 19, 2013 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. While bussing tables and lifting a tub of dishes, Claimant experienced a popping sensation in her lower back area.

2. Claimant obtained conservative treatment for her condition at Spine One. She underwent physical therapy, facet joint injections and epidural steroid injections. Claimant also received medications and underwent an MRI. Physicians also requested a discogram to identify the pain generator in Claimant's lower back.

3. On February 19, 2014 Claimant underwent an independent medical examination with Orthopedic Surgeon Brian Reiss, M.D. He reviewed Claimant's medical records, obtained an oral history and performed a physical examination. Dr. Reiss determined that Claimant suffered from multi-level degenerative disc disease without instability. He concluded that a discogram was not warranted because the procedure is only performed if a decision has been made to proceed with surgery. Relying on the *Colorado Workers' Compensation Medical Treatment Guidelines* (*Guidelines*) Dr. Reiss noted that prior to proceeding with surgery all conservative treatment should be exhausted. He maintained that conservative care had not been completed and additional conservative measures were warranted. He recommended core strengthening and aerobic conditioning. Moreover, because Claimant had only mild degenerative changes at two levels without any instability and was young in age, considerations of fusion surgery were not warranted.

4. Claimant subsequently visited Hashim Khan, M.D. for an examination. In a July 21, 2014 report Dr. Khan noted that Claimant had failed conservative treatment and was interested in visiting a spine surgeon. A subsequent MRI revealed positive findings at L4-L5 and L5-S1.

5. On August 11, 2014 Claimant underwent an evaluation with David Wong, M.D. After performing a physical examination Dr. Wong determined that Claimant suffered lower back pain with degeneration of a lumbar or lumbosacral disc and

probable multifactorial symptom complex. He remarked that Claimant had a significant myofascial component to her pain with very tender paraspinal muscles. Dr. Wong did not believe that the mild stenosis on MRI was clinically significant. He also noted that he could not "completely rule out both an element of nonorganic pain with her discomfort on simulated range of motion testing and contradictory straight leg raising." Dr. Wong explained that discogenic pain was a major component of Claimant's symptom complex. He recommended a psychological evaluation for possible non-organic pain.

6. On October 3, 2014 Claimant visited Kayvon Alizadeh, M.D. for an examination. Dr. Alizadeh recommended a discogram and referred Claimant to Neurosurgeon Chad Prusmack, M.D. for a second opinion. On November 17, 2014 Claimant was evaluated by Dr. Prusmack. After reviewing the conservative treatment Claimant had received, he recommended a discogram to ascertain Claimant's pain generator and need for surgery.

7. Respondents referred Claimant to Michael J. Rauzzino, M.D. for an evaluation of the discogram request. In a November 25, 2014 report Dr. Rauzzino determined that Claimant's annular tear/disc herniation was attributable to her September 19, 2013 industrial injury. Because Claimant had failed other conservative measures, he concluded that the request for a discogram constituted reasonable and necessary medical treatment.

8. Claimant underwent the discogram and returned to Dr. Prusmack on January 7, 2015. Dr. Prusmack noted concordant pain responses at the L2-L3 and L3-L4 levels. He also remarked that there were significant annular tears at L2-L3, L3-L4 and L4-L5. In a January 13, 2015 report Dr. Prusmack commented that "based on [Claimant's] intractable pain and a positive lumbar discography, we have recommended that she undertake a minimally invasive lumbar fusion at the L4-L5 level." Dr. Prusmack formally requested authorization for a discectomy, full facetectomy, interbody fusion and posterior segmental instrumentation.

9. Dr. Reiss reviewed the surgical request. He noted that the MRI reflected degenerative changes from L4-S1 but no signs of nerve root compression. He noted that the discogram revealed concordant pain at two levels and non-concordant pain at another level. Dr. Reiss determined that the discogram had not identified Claimant's pain generator. He remarked that, pursuant to the *Guidelines*, a pain generator must be identified and all conservative treatment measures must have been exhausted before proceeding with surgery. Dr. Reiss thus concluded that Dr. Prusmack's proposed lower back surgery was not reasonable or necessary.

10. On February 9, 2015 Claimant underwent an independent psychological evaluation with psychiatrist Laura J. Klein, M.D. to assess whether she was a good candidate for lower back surgery. Dr. Klein recounted that Dr. Wong had raised psychological concerns when Claimant's straight leg raising was inconsistent. She remarked that Claimant's reliability was highly suspect because her subjective complaints did not correlate with the objective findings. Dr. Klein stated that a

correlation was important because a discogram is a highly subjective test in which it is very difficult to identify a specific pain generator. She ultimately concluded that the proposed surgery was not reasonable from a psychological perspective.

11. On July 13, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Reiss. Dr. Reiss maintained that the surgery requested by Dr. Prusmack was not reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Reiss expressed significant concerns that L4-L5 was Claimant's pain generator. He noted that Claimant likely does not suffer from discogenic pain. Alternatively, if Claimant has discogenic pain, multiple discs are involved and operating on one of them is a "random" and "ludicrous" decision because it contravenes the *Guidelines.* Moreover, operating on multiple levels is inappropriate based on Claimant's young age. Dr. Reiss summarized that surgery would likely not improve Claimant's condition and additional surgeries would likely worsen her symptoms. Dr. Reiss also emphasized that Claimant has not completed conservative care and additional conservative measures would improve her function. Finally, Dr. Reiss noted that there are psychological concerns in proceeding with surgery because Claimant's symptoms have been out of proportion to expected pain levels.

12. On July 20, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Prusmack. He maintained that a minimally invasive lumbar fusion at L4-L5 was reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Prusmack explained that Claimant had failed all conservative treatment and her discogram revealed concordant pain responses at both L2-L3 and L4-L5. The L4-L5 level also had a Grade 4 tear. He identified L4-L5 as Claimant's pain generator.

13. Dr. Prusmack disagreed with Dr. Reiss that Claimant required additional conservative care. He remarked that Claimant has received conservative treatment for over one year. Dr. Prusmack stated that "[t]o go back to the same type of treatment she's already been getting and thinking that now somehow it's going to miraculously improve a lumbar disc which is torn from the accident. I don't think that's a viable alternative. I think it's repetitive and I think it's a waste of time and money."

14. Dr. Prusmack addressed whether Claimant required a psychological examination prior to surgery. He explained that it is not his practice to mandate psychological evaluations unless there are extreme circumstances requiring the need for an examination.

15. Dr. Prusmack detailed the minimally invasive surgery that he sought to perform on Claimant's L4-L5 level. He noted that doctors Wong, Rauzzino and Reiss perform traditional open surgeries in which they make a midline incision. They scrape off and destroy the main extensor muscle of the back called the multifidus. The surgeons then remove the interspinus ligament. Dr. Prusmack explained that the procedure destabilizes the patient globally and leads to dysfunction in terms of limiting future activities. In summary there is a gross dissection of the muscle. The inability to

maintain the muscular envelope produces worse outcomes because of the muscle destruction.

16. In contrast, Dr. Prusmack explained that he performs endoscopic surgery. The procedure involves maintaining the muscular envelope and ligaments. Dr. Prusmack characterized endoscopic surgery as a "muscle-sparing" technique in which adjacent level disc disease drops to about 5% every 10 years. The procedure also leads to less blood loss, fewer inflammatory markers and a decreased need for blood transfusions.

17. Claimant has demonstrated that it is more probably true than not that the request for back surgery by ATP Dr. Prusmack was reasonable, necessary and causally related to her September 19, 2013 admitted industrial injury. Claimant underwent extensive conservative treatment including physical therapy, facet joint injections and epidural steroid injections. Claimant also received medications and underwent an MRI. Because Claimant had failed other conservative measures, Dr. Rauzzino concluded that Claimant's request for a discogram to identify her pain generator constituted reasonable and necessary medical treatment. Upon reviewing the discogram, Dr. Prusmack noted concordant pain responses at the L2-L3 and L3-L4 levels. He also remarked that there were significant annular tears at L2-L3, L3-L4 and L4-L5. Dr. Prusmack identified L4-L5 as Claimant's pain generator.

18. Dr. Prusmack explained that a minimally invasive lumbar fusion at L4-L5 was reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. He detailed that he would perform endoscopic surgery at Claimant's L4-L5 level. The procedure involves maintaining the muscular envelope and ligaments. Dr. Prusmack characterized endoscopic surgery as a "muscle-sparing" technique in which adjacent level disc disease drops to about 5% every 10 years. The procedure also leads to less blood loss, fewer inflammatory markers and a decreased need for blood transfusions. Finally, Dr. Prusmack commented that Claimant did not require additional psychological evaluation prior to undergoing surgery because there were no extreme circumstances raising psychological concerns.

19. In contrast, Dr. Reiss maintained that the surgery requested by Dr. Prusmack was not reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Reiss expressed significant concerns that L4-L5 was Claimant's pain generator. He noted that Claimant likely does not suffer from discogenic pain. Dr. Reiss also emphasized that Claimant has not completed conservative care and additional conservative measures would improve her function. Moreover, Dr. Reiss noted that there are psychological concerns in proceeding with surgery because Claimant's symptoms have been out of proportion to expected pain levels. However, Dr. Prusmack was Claimant's ATP and persuasively explained that he had identified Claimant's pain generator, she had failed conservative care and she did not require additional psychological evaluation. Moreover, the proposed surgery on L4-L5 is minimally invasive. In contrast, a traditional open surgery destabilizes the patient globally and leads to dysfunction in terms of limiting future activities. Accordingly, based on the persuasive medical records and testimony of Dr. Prusmack, the proposed

minimally invasive L4-L5 fusion surgery is reasonable, necessary and causally related to Claimant's September 19, 2013 admitted 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 a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

5. As found, Claimant has demonstrated by a preponderance of the evidence that the request for back surgery by ATP Dr. Prusmack was reasonable, necessary and causally related to her September 19, 2013 admitted industrial injury. Claimant underwent extensive conservative treatment including physical therapy, facet joint injections and epidural steroid injections. Claimant also received medications and underwent an MRI. Because Claimant had failed other conservative measures, Dr.

Rauzzino concluded that Claimant's request for a discogram to identify her pain generator constituted reasonable and necessary medical treatment. Upon reviewing the discogram, Dr. Prusmack noted concordant pain responses at the L2-L3 and L3-L4 levels. He also remarked that there were significant annular tears at L2-L3, L3-L4 and L4-L5. Dr. Prusmack identified L4-L5 as Claimant's pain generator.

6. As found, Dr. Prusmack explained that a minimally invasive lumbar fusion at L4-L5 was reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. He detailed that he would perform endoscopic surgery at Claimant's L4-L5 level. The procedure involves maintaining the muscular envelope and ligaments. Dr. Prusmack characterized endoscopic surgery as a "muscle-sparing" technique in which adjacent level disc disease drops to about 5% every 10 years. The procedure also leads to less blood loss, fewer inflammatory markers and a decreased need for blood transfusions. Finally, Dr. Prusmack commented that Claimant did not require additional psychological evaluation prior to undergoing surgery because there were no extreme circumstances raising psychological concerns.

7. As found, in contrast, Dr. Reiss maintained that the surgery requested by Dr. Prusmack was not reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Reiss expressed significant concerns that L4-L5 was Claimant's pain generator. He noted that Claimant likely does not suffer from discogenic pain. Dr. Reiss also emphasized that Claimant has not completed conservative care and additional conservative measures would improve her function. Moreover, Dr. Reiss noted that there are psychological concerns in proceeding with surgery because Claimant's symptoms have been out of proportion to expected pain levels. However, Dr. Prusmack was Claimant's ATP and persuasively explained that he had identified Claimant's pain generator, she had failed conservative care and she did not require additional psychological evaluation. Moreover, the proposed surgery on L4-L5 is minimally invasive. In contrast, a traditional open surgery destabilizes the patient globally and leads to dysfunction in terms of limiting future activities. Accordingly, based on the persuasive medical records and testimony of Dr. Prusmack, the proposed minimally invasive L4-L5 fusion surgery is reasonable, necessary and causally related to Claimant's September 19, 2013 admitted industrial injury.

ORDER

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

Dr. Prusmack's request for L4-L5 fusion surgery is reasonable, necessary and causally related to Claimant's September 19, 2013 admitted industrial injury.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

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

DATED: September 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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-932-393-01

ISSUES

The issues for determination at hearing are:

- Compensability
- Medical benefits, reasonably necessary, authorized provider;
- Average weekly wage;
- Temporary disability benefits.

FINDINGS OF FACT

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

1. On February 7, 2013, Claimant sustained an injury to her bilateral upper extremities while working within the course and scope of her employment as a meat packer for Employer. She began working for Respondent-Employer more than 20 years ago. Because of her injury, Claimant was off work for several months. Claimant returned to her employment as a meat packer after undergoing treatment for the bilateral upper extremity injuries.

2. Claimant's job includes the packing of meat as it comes down a conveyor belt. She works multiple stations, each with varying sizes of meat to be packed into bags. Some require the use of a hook to pick up the meat, some require her to slide the meat into a bag, others require her to pick up each piece to be put into a bag which she attaches to the device in which the meat is collected, and one station is an automated station which she is rotated into every seventh shift she works. The processing of each piece of meat is expected to be done "the fastest we can do it." The picking up of the bag, the putting the meat inside the bag, and then putting the sealed bag back onto the belt is done at each station three or four times per minute.

3. From the time Claimant arrived at work at 5:30 a.m., Claimant would pick up her equipment, put on her apron, gloves and everything necessary to go to her station to begin work. Depending upon the station worked, she would immediately begin picking up meat with either her hands or the hook provided by the employer. Each bag contained multiple pieces of meat. The lightest weight of bagged meat was three and a half pounds; other bags weighed up to twenty-five pounds each.

4. At table 2, Claimant was required to use a hook in her left hand because the meat rolls from the right to the left. Claimant described the method by which the hook is used: first with the hook facing up, then the meat is grabbed, and by the time the meat is released, Claimant's wrist has rotated so the hook is facing down. The process is repeated until she has placed up to six pieces into a bag. She then closes each bag

and moves it down the line. In order to remove the meat from the hook she is required to move her wrist by extending her arm, collecting the meat on the hook, with the hook placed between the index and next finger. As she picks up the meat she faces her wrist toward the ground, then switches the position of her wrist so the thumb then faces into the air with the rotation so that the hand, when facing up and away from the body, is then again rotated so the hand moves back down to the ground to rotate the meat off the hook. The removal of the meat from the hook then requires a flipping motion which again requires rotation of the wrist with a degree of force required to make the meat come off the hook. At station 2, Claimant completed four bags per minute.

5. Claimant processes different cuts of meat at each station. But all require similar motions to open bags, place the bags on collection containers, deposit the meat into the bags, and then send the bags full of meat on for further processing.

6. When Claimant picks up the meat by hand, the meat is cold to the touch even through her work gloves. Claimant described one station where she is required to pick up the meat with her wrists going toward the ground, then reaching over with her right hand to pull the bag down, pushing the meat with her hands towards the bag, and then pushing the meat into the bag. Once full, Claimant lifts the bag and throws it toward the belt. Claimant provided similar descriptions of her duties at each of the additional stations where she worked. Each station processed different types and weights of meat and each had bagging equipment located either in front of or beside Claimant to grab or open for collecting meat.

7. Claimant's work at began at 5:30 a.m. at a station where she worked until 8:30 a.m. without a break. Claimant had a 15 minute rest period. She returned to a different station where she worked from 8:45 a.m. until 11:45. Claimant then had a thirty minute break, but it was shortened by the time it took her to completely clean up her work area. Employer required that any meat on the floor be picked up and washed in hot water, sprayed with a cleanser and returned to the processing belt.

8. Claimant's lunch break ended at 12:15 p.m. when the belt would restart. She would then work at a different station until her shift ended eight hours after it began.

9. The ALJ finds that Claimant understood and described her job duties more fully than Dr. Cebrian whose description of Claimant's job duties was not as complete or inclusive. For example, Dr. Cebrian testified that "There's already a plastic bag that's on the chute," without acknowledging or seeming to understand that Claimant was responsible for getting the bag, opening it, and putting it onto the chute.

10. Claimant described the onset of her symptoms as feeling like pins and needles in her hands and fingers. She immediately reported her injury to her supervisor, "the red hat," asking to be seen by the on-site nurse. The referral took approximately two to three days and was done at the plant site where Claimant saw Employer's nurse. Employer did not allow Claimant to see the plant physician, Dr. Carlos Cebrian, until the second week following her complaints to her supervisor.

11. After Claimant's first visit with Dr. Cebrian, he instructed her to seek medical care on her own. Although she asked for a second opinion, and went through the union process to obtain such approval, Employer sent her back to Dr. Cebrian for a second time. Dr. Cebrian again instructed Claimant to seek care through her own provider. Claimant selected her family physician, Carole Paynter, Scott Johnson, M.D.'s physician's assistant.

12. PA Paynter opined that Claimant's injuries were work related and she referred Claimant to Dr. Cebrian for treatment. He again sent her back to her personal primary care physician.

13. Claimant reported no non-vocational or recreational activities of a repetitive nature. She does not do yard work, play the piano, do needlework or knitting, or have any hobbies that require her to move her hands regularly. She had no prior treatment for bilateral carpel tunnel syndrome.

14. On August 6, 2013, Dr. Johnson assessed Claimant as having bilateral carpel tunnel syndrome. PA Paynter referred Claimant to see Randy Bussey, M.D. at Banner Health. After initial evaluation and EMG testing, Dr. Bussey recommended surgical repair of both upper extremities. On November 26, 2013 Claimant underwent an open single incision and decompression of the median nerve on the right side. On January 28, 2014, she underwent a similar procedure on the left side.

15. Dr. Bussey, the treating surgeon opined: "Regarding the repetitive nature of her profession and the period of time during which she has been experiencing these symptoms, it is my belief that her bilateral carpal tunnel syndrome is job related. Constant, repetitive use of hands and wrists for 19 years causes median nerve compression in the carpal tunnel in the wrist."

16. Raymond P. van den Hoven, M.D., who performed Claimant's electrodiagnostic testing, stated: "Based on her history, I suspect her work activities played a significant role in her symptoms given the highly repetitive and forceful nature of the activities and the fact that she noticed a 50% improvement within two weeks after discontinuing her work." Dr. van den Hoven diagnosed Claimant as having "moderate to severe bilateral carpal tunnel syndrome, right more than left, with at least moderate denervation on right, mild on left." He also recommended the carpal tunnel release procedure performed by Dr. Bussey.

17. On September 27, 2014, Jack Rook M.D. evaluated Claimant. He agreed with the opinions of Dr. Bussey and Dr. van den Hoven that the bilateral carpal tunnel syndrome is work related. He disagreed with Dr. Cebrian's attempt to use the Medical Treatment Guidelines to disallow the Claimant's injuries. Dr. Rook explained in his report that Claimant job duties meet both the primary and secondary risk factors under the Medical Treatment Guidelines. Dr. Rook also considered Claimant's history and noted that the work she performed for Employer represented the primary repetitive upper extremity activity Claimant performed, noting that her non-vocational activities

were not repetitive or forceful in nature, and she was not involved in any traumatic events causing injury to her hands.

18. Dr. Cebrian agrees with the diagnosis of bilateral carpal tunnel, but considers Claimant's condition to be idiopathic in origin. Dr. Cebrian offered his absolute opinion that no person doing Claimant's job could ever develop carpal tunnel as a result of the work activities.

19. Because Dr. Cebrian held this predetermined, absolute belief, he provided Claimant no diagnostic testing, no treatment, and no work restrictions. Rather, he opined that Claimant's carpel tunnel syndrome was idiopathic – without any known cause.

20. The ALJ finds that Dr. Cebrian is biased towards the Employer in this matter.

- Dr. Cebrian is paid by Employer and works as its medical director.
- Dr. Cebrian did not consider the context of Claimant's injuries but determined absolutely that no worker doing her job could ever develop carpel tunnel syndrome.
- Dr. Cebrian did not deviate from the Guides even though he acknowledged that it could be appropriate for a medical provider to do so.
- In light of Claimant's job duties and twenty year history with Employer, it is not credible to diagnose Claimant's carpel tunnel syndrome as idiopathic.

21. The Division of Worker's Compensation Rule 17, Exhibit 5, Cumulative Trauma Conditions Medical Treatment Guidelines specifically provides that "acceptable medical practice may include deviations from these guidelines as individual cases dictate." The Guidelines themselves dictate that the process used by Drs. Rook, Bussey and van den Hoven are more in line with the intent of the Guidelines which state: "Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions." It goes on to state: "Evaluation of cumulative trauma related conditions require an integrated approach that incorporates ergonomics assessment, clinical assessment, past medical history and psychosocial evaluation on a case-by-case basis." Dr. Cebrian's blanket dismissal of all potential is not credible or in keeping with the intent and appropriate application of the Medical Treatment Guidelines.

22. Dr. Rook explained that "by definition" the Medical Treatment Guidelines are in fact, "guidelines. They are not written in stone, but they are something we need to follow in helping to make our assessments. However, as physicians, we also have to

use our clinical knowledge and, quite frankly, some common sense when making medical decisions that affect people's lives."

23. Dr. Rook disagreed with Dr. Cebrian's opinions relating to both the primary and secondary risk factors mentioned in the Medical Treatment Guidelines. As he described: "She's picking it [meat] up and putting it into some sort of container or bag. This by itself requires her to flip her hands over. That's pronation and supination. And she is doing it, essentially for seven hours a day which is certainly more than six hours a day, and it's certainly more than four hours a day. Likewise, her lifting requirements easily fulfill the criteria of the primary and secondary risk factors." Dr. Rook concluded that the repetitive motion required at all of the stations was very similar. And based on Claimant's hearing testimony, opined that her work activities fulfilled the primary and secondary risk criteria.

24. Dr. Rook agreed the carpel tunnel release surgeries were reasonable and necessary and related to the occupational disease from which she suffered as a result of the exposure at work. He further opined that Claimant's time off work following the surgeries was appropriate to allow sufficient time for her to recuperate from her surgical procedures. Dr. Rook opined: "[t]here cannot be idiopathic carpal tunnel syndrome with the severe electrodiagnostic findings seen" here. Dr. Rook, an expert in electrodiagnostic medicine testified that her had never heard of or seen such a case.

25. Dr. Rook further diagnosed Claimant with an occupational tendon injury at the left middle finger, which caused Claimant an inability to fully flex the left middle finger. He further explained that when carpal tunnel syndrome initially develops and the physical trauma that caused the problem is not alleviated or changed in some way, it will accelerate the development of the condition, sometimes in an exponential fashion

26. Dr. Rook, board certified in electrodiagnostic medicine, explained that the prolongation of the distal latency seen on Claimant's EMG in his opinion was in the severe range for both hands. He explained that: "Something like that just doesn't happen spontaneously."

27. Dr. Rook opined that Dr. Cebrian was wrong to place Claimant at MMI on February 19, 2013, because Claimant was diagnosed with carpel Tunnel syndrome and had not been provided any treatment.

28. Dr. Rook testified that income from performing claimant IMEs constitutes less than 5% of his income. Of that, approximately one-third are referrals from Claimant's counsel's firm. Thus, only approximately 1.67% of Dr. Rook's income is generated by performing claimant IMEs referred by Claimant's counsel's firm. The ALJ finds that this amount is too small to demonstrate bias by Dr. Rook in favor of Claimant.

29. Employer released Claimant from all duty on August 6, 2013, telling her she could no longer work with restrictions. Employer told Claimant before her initial surgery that she would not be allowed to return to work until she was "well." Employer

charged Claimant personal illness for the time she required to recover from her bilateral carpal tunnel surgeries. Claimant returned to full duty work March 9, 2014.

30. Employer's payroll records demonstrate Claimant's gross earnings for the prior 12 full pay periods included wages of: $583.10 + 756.98 + 597.25+ 750.20 + 752.19 + 551.57 + 577.87 + 552.00 + 721.09 + 550.14 + 441.60 + 586.08 (Cl. Ex. 15, pp 80-82) = $7,420.07 for an average weekly wage of $618.34. Given Claimant also reported some periods of earnings in excess of $1,000.00 e.g. during July, 2013, Claimant's period of vacation during that same 12 week period was not deleted from the income stream because it would unreasonably reduce the income when considering only the immediate preceding 12 week period.

31. The ALJ finds, based on the totality of the evidence that Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities, namely bilateral carpal tunnel syndrome, and damage to the tendon of Claimant's left middle index finger.

32. The ALJ finds, based on the totality of the evidence, that Claimant has proven by a preponderance of the evidence that it is more probably true than not that the treatment Claimant received from Carol Paynter, PA-C, Scott Johnson, M.D., Randy Bussey, M.D., Raymond P. van den Hoven, M.D., and all attendant care related thereto, was reasonably necessary and causally related to Claimant's occupational disease. Claimant has proven by a preponderance of the evidence that Insurer should be liable for all said medical benefits under the Act.

33. The ALJ finds, based on the totality of the evidence, that Claimant's average weekly wage is $618.34.

34. The ALJ finds, based on the totality of the evidence, that Claimant has proven by a preponderance of the evidence that she became temporarily and totally disabled commencing on August 6, 2013 and continued in that disability until she was returned to work on March 1, 2014. Claimant is entitled to temporary total disability through the entirety of said period.

35. The ALJ finds, based on the totality of the evidence, that Claimant has proven by a preponderance of the evidence that Drs. Johnson, Bussey, van den Hoven, and PA Paynter, should be deemed authorized providers.

CONCLUSIONS OF LAW

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

General Principals of Law/Compensability

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.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). If the claimant makes the requisite showing of causation the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation the ALJ may consider the provisions of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the Guidelines upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined, every medical treatment provider except Dr. Cebrian reasonably attributed Claimant's carpel tunnel syndrome to her work activities. The ALJ finds and concludes that the opinions regarding causation offered by Carol Paynter, PA-C, Scott Johnson, M.D., Randy Bussey, M.D., Raymond P. van den Hoven, M.D support the ALJ's conclusion that Claimant's carpel tunnel and finger injury are causally related to her work activities. Dr. Cebrian's opinions to the contrary are less persuasive because of his bias toward Employer.

Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities, including bilateral carpal tunnel and damage to the tendon of Claimant's left middle index finger.

Medical Benefits

Section 8-42-101(1)(a), supra, provides:

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

Respondents thus 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). *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

The ALJ finds and concludes that Claimant showed it more probably true than not that the treatment she received from Carol Paynter, PA-C, Scott Johnson, M.D., Randy Bussey, M.D., Raymond P. van den Hoven, M.D., and all attendant care related thereto, was reasonably necessary and causally related to Claimant's occupational disease and are hereby determined the liability of Insurer. This conclusion is supported by the persuasive evidence in the record and the opinions of Drs. Rook and Bussey.

Claimant is therefore entitled to ongoing treatment and follow-up with her authorized treating physicians subject to Respondents' right to challenge any specifically requested future care or form of treatment based on established case law. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

The determination of whether a particular treatment is reasonable and necessary is a question of fact for the ALJ. *City & County of Denver School Dist 1 v. ICAO,* 682 P.2d 513 (Colo. App. 1984). The ALJ finds and concludes that Claimant's bilateral surgeries, EMGs and care attendant thereto are reasonable, necessary and related to the compensable occupational disease.

Average Weekly Wage

Section 8-42-102(2), *supra*, requires the ALJ to base claimant's average weekly wage (AWW) on her earnings at the time of injury. Section 8-42-102(3), *supra*, grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

The ALJ finds and concludes that an average weekly wage of $618.34 most accurately approximates the wage loss and loss of earning capacity resulting from Claimant's occupational disease.

Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury or occupational disease caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The ALJ finds and concludes that Claimant proved by a preponderance of the evidence that she became temporarily and totally disabled commencing on August 6, 2013 and continued in that disability until she was returned to work on March 1, 2014. Claimant remained entitled to temporary total disability through the entirety of said period.

Authorized Provider

Section 8-43-404(5)(a)(I)(A) C.R.S. requires that in all cases, the employer or insurer shall provide a list of at least two physicians, two corporate medical providers, or at least one physician and one corporate medical provider in the first instance from which the employee may select a physician. Here, Claimant requested a second physician to attend to her injuries and was merely sent back to Dr. Cebrian, the same on-site physician she was originally referred to by the employer. There was no evidence that Claimant ever received, through any verifiable method, a list of potential providers from which she could select a physician. In addition, Dr. Cebrian instructed Claimant to seek care through her personal physician. As a result, the right of selection of the authorized treating physician passed to Claimant. She did, as found, select her primary treating physician who then became her selected provider. Thereafter, Scott Johnson, M.D. through his physician's assistant Carol Paynter, referred Claimant for additional care and surgical evaluation by Dr. Bussey, who in turn referred her to Dr. van den Hoven.

The ALJ finds and concludes that PA Paynter, and Drs. Johnson, Bussey, and van den Hoven are all therefore hereby deemed to be authorized treating providers.

ORDER

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

1. Claimant has proven by a preponderance of the evidence she suffered a compensable bilateral upper extremity carpal tunnel syndrome, including additional damage to her left middle finger.

2. Claimant has further proven by a preponderance of the evidence that reasonable, necessary, related and authorized medical care was provided by Drs. Bussey, van den Hoven and PA Paynter, including surgery to both upper extremities as performed by Dr. Bussey, along with all attendant care related thereto.

3. Drs. Johnson, Bussey and van den Hoven shall be considered Claimant's authorized treating physicians. Insurer shall pay, pursuant to fee schedule, for reasonably necessary medical treatment provided by all treating physicians, including, but not limited to said providers and as provided by medical providers to whom said providers referred Claimant for reasonable necessary and related medical care.

4. Claimant is entitled to ongoing medical treatment reasonably necessary and related to her compensable February 7, 2013 occupational disease until otherwise properly terminated by law. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's compensable occupational disease and/or that the recommended treatment is not reasonable or necessary.

5. Insurer shall calculate Claimant's indemnity benefits based upon an AWW of $618.34.

6. Claimant is entitled to temporary total disability compensation from August 6, 2013 until she was returned to work on March 1, 2014.

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

8. 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: September 11, 2015

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

ISSUES

The issues presented for determination are whether Claimant proved by a preponderance of the evidence that she suffered a compensable injury in the course and scope of her employment for Employer and whether she proved entitlement to medical benefits to cure and relieve her of the effects of the injury.

FINDINGS OF FACT

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

1. Employer is a Moroccan restaurant with workers' compensation insurance coverage through Insurer.

2. Said Benjelloun, Claimant's spouse, is an officer of Employer and submitted the Workers' Compensation Application to the Insurer. The individuals specifically included for coverage are Said Benjelloun and Claimant. Claimant is listed as a cook on the application for coverage.

3. The workers' compensation policy issued to the Employer specifically lists coverage endorsement for Said Benjelloun and Claimant.

4. On June 12, 2013, Claimant was at the restaurant working in her capacity as a chef. She went to get a pan which fell and hit her in the nose causing her to fall down and hit her back.

5. Claimant was seen at the emergency room at Porter Adventist Hospital on June 14, 2013. The history given was that she had been hit in the nose by a pot, felt dizzy, and then fell onto her buttocks. She appeared in the emergency room complaining of back pain, nose pain, and dizziness.

6. Claimant was referred by Respondents to Concentra, where she has received medical care for her injuries. All medical reports are consistent with the history of the accident which occurred at work on June 12, 2013.

7. Insurer filed a Notice of Contest on November 12, 2013, for "further investigation." No subsequent Notice of Contest was filed.

8. Claimant was paid by the Employer for her services as a Moroccan chef. Claimant was not provided with a W-2 form, nor do the tax returns reflect the wages paid to the Claimant.

9. At the time Employer applied for workers' compensation insurance coverage with the Insurer, Employer intended to cover both Said Benjelloun and Claimant as employees. The workers' compensation policy that was issued and in effect on the date of accident reflects that Claimant was covered as an employee of Employer under the policy.

10. At the time of her injury on June 12, 2013, the Claimant was employed as a chef for the Employer. At the time of her injury she was performing a service arising out of and in the course of her employment.

CONCLUSIONS OF LAW

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

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the 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 Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or

compensation are sought. *Snyder v. Industrial Claim Appeals Office*, supra. Whether a claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

5. Under Section 8-41-301, the right to compensation applies where, at the time of the injury, both the Employer and the Employee are subject to the provisions of the Act, the Employer has complied with the provisions regarding insurance, the Employee is performing a service arising out of and in the course of the employment, and the injury is proximately caused by an injury arising out of and in the course of the Employee's employment and is not intentionally self-inflicted. In this case, all conditions of recovery have been met.

6. The Employer did comply with the provisions of the statute regarding insurance and specifically obtained a workers' compensation policy for the restaurant with coverage for both Said Benjelloun and Claimant.

7. The ALJ finds that Claimant was being paid for her services. Claimant has established that there was a contract of hire between herself and Employer. She was hired to perform services as a chef, which included duties of cooking, cleaning, and preparing food, and was in fact performing those services as a chef in a Moroccan restaurant on the date of the accident.

8. Insurer presented documentation, including tax returns, to establish that Employer did not report Claimant's wages on the tax returns. However, such documentation is not probative of the issue whether Claimant was an employee of the Employer at the time of the injury.

9. The ALJ finds that the Claimant has sustained her burden of proving entitlement to medical benefits by a preponderance of the evidence. She has established that she was an employee of the Employer at the time her injury occurred and that her injury occurred within the time and place limits of her employment and during an activity that was connected to the Claimant's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colorado 1991); *Triad Painting v. Blair*, 812 P.2d 638 (Colorado 1991). The Insurer presented no evidence to rebut the Claimant's testimony that her injury occurred while working as a chef. The medical records also support the Claimant's testimony in that regard.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable industrial injuries while employed by Employer on June 12, 2013.

2. The medical care received by Claimant at Porter Adventist Hospital, and from Concentra Medical Centers and all referrals are authorized, reasonably necessary and related medical benefits.

3. Respondents shall pay costs of all medical care and treatment provided or ordered by the authorized medical providers, subject to the Division of Workers' Compensation medical fee schedule.

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

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

DATED: _August 31, 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

- Was the claim closed by Claimant's alleged failure timely to contest a final admission of liability?
- Did Respondents overcome by clear and convincing evidence the Division independent medical examiner's finding that Claimant has not reached MMI?
- Did Claimant prove by a preponderance of the evidence that piriformis muscle injections constitute reasonable and necessary medical treatment?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 13 were admitted into evidence. Respondents' Exhibits A through G were admitted into evidence.

2. On June 21, 2013 Claimant sustained admitted injuries when she fell at work. Claimant was employed as a welder.

3. On June 21, 2013 Ted Villavicencio, M.D., examined Claimant at Concentra Medical Centers (Concentra). Claimant gave a history that she fell on an uneven surface and injured her left knee and low back. Dr. Villavicencio completed a physical examination (PE) and noted there was no tenderness over the thoracic and lumbar spine, the "SI J" was "nontender," and the paraspinous muscles exhibited tenderness that was greater on the right than the left. Dr. Villavicencio assessed a "fall with multiple injuries" including "axial pain-likely lumbar strain" and a left knee contusion. He prescribed medication, a knee brace and stated he would start "conservative treatment."

4. On July 17, 2013 Marion Wells, P.A., examined Claimant at Concentra. Claimant's knee and shoulder pain was improved with physical therapy (PT) however she continued to struggle with "central L/S" pain. PA Wells noted Claimant was "mildly tender over lumbar spine," "mildly tender over RSI J" and "tender over paraspinous muscles." PA Wells assessed improved lumbar pain, an improved left knee contusion and improved bilateral shoulder strains. PA Wells placed Claimant on "modified duty" and prescribed PT.

5. On August 20, 2013 physiatrist Samuel Chan, M.D., examined Claimant on referral from PA Wells. Claimant reported left-sided interscapular pain and left-sided lumbar spine pain "over the left PSIS area." On PE Dr. Chan noted "significant

tenderness" to palpation "over the left PSIS and sacral sulcus." Patrick's test was "grossly positive on the left." Dr. Chan assessed myofascial complaint of the thoracic spine and rule out left sacroiliac (SI) joint dysfunction. Dr. Chan issued prescriptions for Lodine and Ambien. Dr. Chan agreed with PA Wells that claimant should undergo an "active exercise program" and that referral to a chiropractor was appropriate. Dr. Chan opined that if the symptoms continued he would consider "trigger point injections v. SI injection."

6. Richard Mobus, D.C. provided 5 chiropractic treatments from August 21, 2013 through September 4, 2013. Dr. Mobus documented complaints of "mid back pain" somewhat stronger on the left side and left low back pain with "occasional pinching." On September 4, 2013 Dr. Mobus noted mild aggravation of the left low back pain with seated rotation at 20 degrees. He also recorded a positive straight leg raise test "at end range with mild aggravation of the left low back." A FABER maneuver was positive for mild aggravation of left low back pain. Dr. Mobus provided treatments including manipulation, active myofascial release and therapeutic stretching. Dr. Mobus reported the Claimant experienced "moderate benefits overall regarding symptomatic improvement and functional gains."

7. On October 8, 2013 Dr. Chan again examined Claimant. Dr. Chan recorded that Claimant's pain complaint continued to be "rather significant" despite the chiropractic treatments. On PE Dr. Chan noted tenderness and active trigger points in the rhomboid muscles, and "tenderness to palpation over the left PSIS and sacral sulcus." Dr. Chan observed that, "The left SI joint engages slower than the right with lumbar forward flexion." Straight leg raising was negative and Patrick's test was "positive on the left side." He stated that her findings were suggestive of "sacroiliac joint dysfunction as well as myofascial complaints of the thoracic spine area." Dr. Chan recommended an SI joint injection.

8. On October 24, 2013 Dr. Chan performed a "left sacroiliac joint steroid injection."

9. Claimant returned to Dr. Chan on October 29, 2013. Dr. Chan noted Claimant "did not fill out her pain diary, and we do not have a clear sense of how she feels immediately after the injection." However, Claimant reported that her pre-injection pain was 7 on a scale of 10 (7/10) and the post-injection level was 7/10. On October 29 Claimant rated her pain at 8.5/10. Dr. Chan recommended a low back MRI. He stated that if Claimant "truly has no response to the SI injection, no further injection therapy would be offered."

10. On November 5, 2013, Dr. Chan saw Claimant in follow up. Claimant reported temporary benefit from the SI joint injection but on November 5 her pain was 7/10. On PE Dr. Chan noted tenderness in the "rhomboideus, levator scapulae, and trapezius muscles" with "active trigger points." On PE of the lumbar spine Dr. Chan noted the bilateral SI joints "engaged symmetrically with lumbar forward flexion" and that "Patrick's [was] positive on the left." Dr. Chan wrote that he had discussed the case with Dr. Villavicencio and that "it is felt patient's presentation are mostly suggestive of

myofascial-type complaints." Dr. Chan performed injections to "4 active trigger points over the left levator scapulae, trapezius, and rhomboideus muscles."

11. On November 7, 2013, Claimant underwent an MRI of the lumbar spine. The radiologist interpreted the MRI as showing a small central "L5-S1 disc protrusion and mild bilateral facet arthropathy resulting in mild bilateral neural foraminal narrowing."

12. On November 11, 2013 Dr. Villavicencio examined Claimant. Claimant reported some improvement in the area of the right scapula after the trigger point injections, but her pain was recurring. Dr. Villavicencio described the lumbar MRI findings as "minimal." On PE of Claimant's back Dr. Villavicencio noted "mild R>L SI J tenderness" and a negative Patrick's test. Dr. Villavicencio's assessment included: "Lumbar pain – improved, had persisting pain in L SI J area – now S/P injection with Dr. Chan – not improved much." Dr. Villavicencio provided a prescription for a Lidoderm patch and referred Claimant for additional PT.

13. On November 19, 2013 Dr. Chan again examined Claimant. Dr. Chan noted Claimant had undergone multiple modes of treatment and had a "nondiagnositc left sacroiliac joint injection" and "nondiagnostic" trigger point injections. Dr. Chan reviewed the MRI results (including the films) and noted "minimal" disk bulges at L3-4 through L5-S1 and "mild bilateral neural foraminal narrowing, more pronounced on the right side L3-4 and L4-5 levels." Claimant advised Dr. Chan that she had read the MRI report and Dr. Chan stated that "indeed she is having more right-sided pain, per the MRI findings." Dr. Chan noted that before the MRI Claimant complained of left-sided pain but after the MRI she complained of right-sided pain. Dr. Chan opined that Claimant continued to be "rather highly suggestible," that Claimant's PE was "somewhat unrevealing" and that none of the treatment modalities had "offered any type of benefits." Dr. Chan stated that with "nonphysiologic findings and the absence of significant objective findings, clinical examination" Claimant should "follow through with an active exercise program." Dr. Chan stated that "at best" Claimant was "presenting with myofascial-type complaints and recommended a work conditioning program. Dr. Chan opined claimant would be at MMI after she completed the program.

14. On November 26, 2013, Darla Draper, M.D., examined Claimant at Concentra. Dr. Draper recorded that Claimant complained of back pain with "intensity of pain at 7-1/2 over 10, left greater than right." Dr. Draper recommended Claimant continue PT and prescribed Tizanidine.

15. On December 10, 2013 Dr. Villavicencio again examined Claimant. On PE of Claimant's back Dr. Villavicencio noted "mild R>L SI J tenderness" and a negative Patrick's test. Dr. Villavicencio's assessment included: "Lumbar pain – improved, had persisting pain in L SI J area – now S/P injection with Dr. Chan – not improved much, MRI with minimal changes." Dr. Villavicencio continued Lodine. Dr. Villavicencio noted Claimant was "frustrated with lack of progress" in her treatment and referred her for a "physiatry second opinion."

16. Claimant returned to Dr. Villavicencio on December 26, 2013. On PE of the back Dr. Villavicencio noted "some B upper lumbar paraspinous muscle tenderness, mild spasm R>L mild, mild R>L SI J tenderness." Dr. Villavicencio's assessment included: "Lumbar pain- Subjective > objective findings- persisting pain in L SI J area- and now mor [sic] diffuse B paraspinous lumbar area- S/P iSI J with Dr Chan – not improved much, MRI findings with minimal changes.

17. On January 8, 2014 John Aschberger, M.D., saw Claimant for a physical medicine evaluation. Claimant reported "irritation at the left low lumbar area with irritation superiorly to the medial scaupula and recurrent shooting pain at the posterior thigh into the calf on the left." On PE Dr. Aschberger noted significant lumbar restriction on extension. Patrick's test resulted in "Complaint of low back pain on the left, negative right." Dr. Aschberger assessed lumbosacral dysfunction and restriction and "secondary myofascial pain and irritation." Dr. Aschberger opined Claimant's treatment had "been appropriate." Dr. Aschberger stated that there were findings on examination that "localize toward the SI joint" and he agreed with the injection that had been performed. He stated Claimant had radicular symptoms but the PE was not suggestive of a radicular abnormality and the MRI did not show a "significant abnormality to account for the symptoms." Dr. Aschberger recommended manual therapy to improve movement of the low back and medication management.

18. On February 20, 2014 John Burris, M.D., examined Claimant at Concentra for "delayed recovery issues regarding her pain complaints." Claimant reported she was experiencing "5/10 diffuse back pain extending from the left shoulder blade down into the left buttocks region." Dr. Burris diagnosed "low back pain" and noted a "relatively benign examination with essentially negative diagnostic workup." He agreed with Dr. Chan and Dr. Aschberger that Claimant had "some myofascial pain." Dr. Burris agreed with Dr. Aschberger's recommendations for a more aggressive course of PT. Dr. Burris also recommended 6 osteopathic manipulation sessions and that Claimant wean off of medications including Lyrica, Zanaflex and Flexeril. He prescribed metaxalone.

19. Dr. Burris again saw Claimant on March 6, 2014. Dr. Burris noted that the PT and osteopathic manipulation therapies had not been authorized and he intended to inquire about the referrals. He prescribed diazepam.

20. On April 3, 2014, Claimant reported to Dr. Burris that diazepam had been "somewhat helpful" and the home exercise program had led to some gradual improvement. Claimant continued to perform light duty but could not do her normal welding activities. Dr. Burris stated that he intended to "appeal" the denial of the aggressive PT and osteopathic manipulations. He opined Claimant would reach MMI once she completed these treatments.

21. On May 15, 2014 Dr. Burris again examined Claimant. Dr. Burris noted that 6 sessions of osteopathic manipulation and 6 sessions of PT had been approved. Claimant had completed 2 sessions of osteopathic manipulation and 2 sessions of PT. Dr. Burris stated that Claimant continued to have a "benign examination with negative

diagnostic workup." Dr. Burris opined Claimant was at MMI and found "no objective basis for impairment or permanent work restrictions."

22. Between April 30, 2014 and June 9, 2014 Claimant underwent 5 osteopathic treatments performed by Mark Winslow, D.O. On June 9 Dr. Winslow noted that Claimant reported that modification of activities, exercises and osteopathic treatments and all been helpful in improving her symptoms. Dr. Winslow also stated Claimant had returned to full work activities.

23. On May 28, 2014 the Insurer filed a Final Admission of Liability (FAL) based on Dr. Burris's May 15, 2014 report. The FAL admits Claimant reached MMI on May 15 with no permanent impairment. The FAL contains a certificate of mailing certifying the admission was mailed to Claimant at 3255 West Avondale Drive Denver, CO 80204 and to Claimant's counsel at 1720 S Bellaire Suite 500 Denver, CO 80222. The certificate of mailing also indicates the FAL was mailed to the Division of Workers' Compensation (DOWC).

24. Claimant admitted that 3255 West Avondale Drive Denver, CO 80204 was her address. However, she testified that she did not receive the FAL.

25. On August 20, 2014 Claimant's counsel filed an Objection to Final Admission (Objection). The Objection contested various issues admitted in the May 28, 2014 FAL including the issue of whether Claimant had attained MMI. The Objection further stated the FAL was not received by Claimant's counsel until August 19, 2014.

26. Attached to the Objection was a verified affidavit of Claimant's counsel dated August 20, 2014. In the affidavit Claimant's counsel states the following. On August 19, 2014 she reviewed medical records forwarded by Respondents on July 18, 2014. Within the medical records was Dr. Burris's May 15, 2014 report placing the claimant at MMI without impairment. She contacted the DOWC and was advised that the Division received the FAL on June 3, 2014. Claimant's counsel then contacted the office of Respondents' counsel and a paralegal faxed a copy of the FAL. Claimant's counsel states she personally opens the mail and checks for final admissions and her office did not receive the FAL. Claimant's counsel also reviewed Claimant's file and did not find a copy of the FAL. Claimant's counsel stated that either the Insurer "did not actually put the Final Admission in the mail to my office, or the United States Postal Service did not deliver it to my office."

27. On August 20, 2014 Claimant's counsel completed and mailed a Notice and Proposal to Select an Independent Medical Examiner (N&P).

28. Respondents moved to strike the Claimant's Objection and N&P arguing they were not timely filed. However, on October 24, 2014 a prehearing administrative law judge denied the motion ruling that it presented questions of fact for determination by the OAC.

29. On December 23, 2014 William Watson, M.D. performed the DIME. Dr. Watson took a history from Claimant, reviewed medical records and performed a PE.

Claimant told Dr. Watson that her pain was "localized more to the left buttocks" and that when she welded in an "awkward position" she experienced increasing pain in the left buttocks region. The Claimant also reported continuing pain "in the left lower back region." The Claimant advised that the sacral injection by Dr. Chan had helped "at first" but her previous symptoms had returned. On PE Dr. Watson recorded that "Patrick's maneuver," a provocative test for SI joint dysfunction, caused mild pain in the left buttocks region. The Lasegue test, a provocative test for piriformis syndrome, caused "pain over the piriformis muscle on the left." Flexion, adduction and internal rotation caused pain in the left piriformis region.

30. Dr. Watson's impressions included "status post fall" with resolved left shoulder and knee symptoms and "status post fall with continued pain in the lower back and left buttocks region." Dr. Watson opined that "on top of the SI joint dysfunction" the Claimant exhibited "evidence of piriformis syndrome which may be causing continued pain and discomfort in the left buttocks." Dr. Watson opined Claimant has not reached MMI. He recommended Claimant undergo a "diagnostic injection of the piriformis muscle on the left side." Dr. Watson opined that if the injection provided a "good result [Claimant] may be a good candidate for Botox injection into the same muscle." He also opined Claimant "would be a good candidate for physical therapy sessions to address piriformis syndrome on the left side." Dr. Watson also opined that the Claimant's "SI joint dysfunction on the left side could be aggravating the piriformis type syndrome and may have to be addressed in the future."

31. On March 5, 2015 Allison Fall, M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Fall is board certified in physical medicine and rehabilitation and is level II accredited. In connection with the IME Dr. Fall took a history from Claimant, reviewed pertinent medical records including that DIME report and performed a PE.

32. In the DIME report Dr. Fall assessed complaints of low back pain "without specific diagnosis or correlating objective findings." Dr. Fall disagreed with Dr. Watson that claimant has a diagnosis of SI joint dysfunction." Dr. Fall opined Claimant's "initial symptoms" were not consistent with a diagnosis of SI joint dysfunction. Specifically, Dr. Fall pointed out that when Dr. Villavicencio examined Claimant on June 21, 2014 she was "nontender" over the SI joints and the paraspinous muscles were more tender on the right than the left. Dr. Fall also agreed with Dr. Chan that Claimant's response to the SI joint injection was "nondiagnostic."

33. Dr. Fall disagreed with Dr. Watson's opinion that Claimant is not at MMI and that Claimant should undergo a diagnostic injection in the piriformis muscle and possibly Botox injections. Dr. Fall concurred with Dr. Chan that the Claimant is not a candidate for further injections considering "the longevity of the symptoms with changing area of symptoms and the fact that she has had no long-term improvement with any treatment to date."

34. Dr. Fall disagreed with Dr. Watson's opinion that the Claimant had a "Table 53 diagnosis" to support an impairment rating for the lumbar spine. Dr. Fall

explained that that Dr. Watson had not identified a specific diagnosis for the Claimant's back pain.

35. At hearing Dr. Fall testified as follows. Dr. Fall reiterated her disagreement with Dr. Watson's opinion that Claimant is not at MMI because she should undergo a piriformis injection and possibly Botox injections with additional PT. Dr. Fall opined that there is no reasonable expectation that the treatment proposed by Dr. Watson will result in functional gains or improvement in the Claimant's condition. In support of this opinion Dr. Fall explained that piriformis syndrome is a controversial diagnosis that involves a group of symptoms "seamed together" rather than an identifiable disease process or pathology. The diagnosis of piriformis syndrome posits that the piriformis muscles, which cross the SI joints in the buttocks, become tight and compress the sciatic nerve so as to cause lower extremity pain, weakness and numbness. Dr. Fall noted that Dr. Watson did not document any lower extremity weakness or numbness. She also noted that no other physician besides Dr. Watson has diagnosed piriformis syndrome.

36. Dr. Fall further noted that the PT records document that treatment provided for the SI joint dysfunction included piriformis stretches and hip abduction exercises. Dr. Fall explained that these exercises would treat both SI joint dysfunction and piriformis syndrome by strengthening the muscles. Dr. Fall opined that an injection into the piriformis syndrome would not improve the Claimant's condition and would, at best, provide short term relief of symptoms.

37. Dr. Fall opined that Botox injections are not likely to improve the Claimant's condition. Dr. Fall explained that Botox injections would weaken the piriformis muscle for three months and permit the strengthening of surrounding muscles. However, Dr. Fall stated that she has seen documentation of tightness, spasm or dysfunction of the piriformis muscle. Dr. Fall also stated that if Claimant truly had piriformis syndrome the pain would have stayed in the mid buttocks region rather than moving around.

38. On cross-examination Dr. Fall confirmed that Dr. Watson performed the appropriate provocative tests for SI joint dysfunction and piriformis syndrome.

39. On cross-examination Dr. Fall agreed that over the past five years she has testified in 194 workers' compensation cases. Dr. Fall testified that at least 95% of the time she was asked to testify for the respondents. Dr. Fall stated that over this time she has testified for the Respondents' counsel 29 times.

40. Dr. Watson testified at the hearing. Dr. Watson is level II accredited and board certified in orthopedic surgery. Dr. Watson testified that based on the mechanism of injury and his review of the medical records he was concerned Claimant had the low back condition of SI joint dysfunction or the much rarer condition known as piriformis syndrome. Dr. Watson stated that he conducted "provocative testing" for SI joint dysfunction and piriformis syndrome. Both tests were positive because they reproduced

the Claimant's symptoms. Claimant was tender in the area of the piriformis muscle. Dr. Watson explained that piriformis is a clinical diagnosis.

41. Dr. Watson opined Claimant is not at MMI. Dr. Watson testified that Claimant reported considerable pain and discomfort when she was working. Dr. Watson testified that the Medical Treatment Guidelines for treatment of piriformis syndrome call for an injection of lidocaine into the piriformis muscle and treatment with Botox injections if the lidocaine injection relieves symptoms. Dr. Watson also testified that he is familiar with a recent study that recommends the use of Botox to treat piriformis syndrome.

42. Dr. Watson testified on cross-examination that he considered Claimant's symptoms were "consistent" with respect to location.

43. In her position statement Claimant requests that the ALJ take administrative notice of WCRP 17 Exhibit 1, Low Back Pain Medical Treatment Guidelines (F)(4)(a) (Low Back MTG). The ALJ concludes that the Low Back MTG are a proper subject for administrative notice since they are published rules of the Division of Workers' Compensation (DOWC) and are readily available for review on the DOWC's website. *See Leprino Foods Co. v. Industrial Claim Appeals Office,* 134 P.3d 475, 479 (Colo. App. 2005) (judicial notice may be take of public matters including rules and regulations promulgated by an administrative agency).

44. The Low Back MTG [WCRP 17 Exhibit 1(F)(4)(a)] concerning the injection of botulinum toxin (Botox) provides as follows;

> They may be used for chronic piriformis syndrome. There is some evidence to support injections for electromyographically proven piriformis syndrome. Prior to consideration of botulinum toxin injection for piriformis syndrome, patients should have had marked (80% or better) but temporary improvement, verified with demonstrated improvement in functional activities, from three separate trigger point injections. To be a candidate for botulinum toxin injection for piriformis syndrome, patients should have had symptoms return to baseline or near baseline despite an appropriate stretching program after trigger point injections. Botulinum toxin injections of the piriformis muscle should be performed by a physician experienced in this procedure and utilize either ultrasound, fluoroscopy, or EMG needle guidance. Botulinum toxin should be followed by limb strengthening and reactivation.

FINDINGS CONCERNING NOTICE OF FAL

45. Claimant credibly testified that the FAL was mailed to her home address but she did not receive it. Claimant's testimony is corroborated by the affidavit of

Claimant's counsel who stated under oath that she did not receive the FAL even though it was addressed to her office.

46. Claimant's testimony that she did not receive the FAL, and Claimant's counsel's affidavit that she did not receive the FAL at her office, are credible and persuasive evidence sufficient to overcome the presumption of receipt created by the certificate of mailing contained in the FAL.

47. The evidence credibly and persuasively establishes that either the Insurer did not mail the FAL to Claimant and her attorney as represented in the certificate of mailing, or the postal system failed to deliver the FAL to Claimant and her attorney for reasons that cannot be ascertained from the evidence.

48. Because neither Claimant nor her attorney received notice of the FAL the FAL was not sufficient to close the claim and preclude Claimant from filing the N&P to select the DIME physician.

FINDINGS CONCERNING OVERCOMING DIME ON MMI

49. Respondents failed to prove it is highly probable and free from serious doubt that Dr. Watson, the DIME physician, erred in finding Claimant has not reached MMI.

50. Dr. Watson credibly testified that much of the Claimant's "low back pain" has localized to the area of the left buttocks. Dr. Watson credibly noted that testing designed to evoke symptoms of piriformis syndrome was positive and that Claimant was tender over the piriformis muscle. Dr. Watson credibly opined that in light of Claimant's history and medical records she needs further diagnostic testing for piriformis syndrome including injections as a possible prelude to Botox treatment. Dr. Watson credibly and persuasively opined that the Low Back MTG specifically address circumstances when piriformis injections followed by Botox injections are appropriate. Dr. Watsons' testimony that injections may be used to treat piriformis syndrome is corroborated by reference to the Low Back MTG noticed in Finding of Fact 43.

51. The opinions expressed by Dr. Fall are not sufficiently persuasive to demonstrate that it is highly probable and free from serious doubt that Claimant has reached MMI. Essentially, Dr. Fall disputes Dr. Watson's recommendation for injections in the piriformis muscle followed by possible Botox injections and PT because Dr. Fall is of the opinion that Claimant does not have piriformis syndrome. Dr. Fall also believes that the injections are not likely to benefit the Claimant and therefore are not reasonable and necessary.

52. Insofar as Dr. Fall opined the Claimant probably does not have piriformis syndrome because his symptoms have been "inconsistent," that opinion is not persuasive refutation of Dr. Watson's opinion. While the medical records demonstrate that Claimant's low back symptoms have sometimes varied in intensity and location, the medical records also demonstrate a rather consistent history of left sided-low back symptoms since the date of injury. When Claimant was examined by Dr. Villavicencio

on June 21, 2013 he noted paraspinous tenderness that was "greater" on the right than left." The ALJ infers from this record that on June 21 the left low back was symptomatic, but less so than the right low back. When Dr. Chan examined Claimant on August 20, 2012 he noted Patrick's test was "grossly positive on the left" and determined it was necessary to "rule out" left SI joint dysfunction. In September Dr. Mobus noted left low back pain with occasional "pinching." When Dr. Draper examined Claimant in November 2013 she noted back pain that was greater on the left than the right. When Dr. Aschberger examined Claimant in January 2014 he noted Patrick's test was positive on the left and negative on the right. When Dr. Burris examined Claimant on February 20, 2014 he noted "diffuse back pain radiating from the left shoulder blade down into the left buttocks region."

53. Insofar as Dr. Fall testified that Dr. Watson erroneously found a Table 53 diagnosis, that testimony is not persuasive evidence to refute Dr. Watson's opinion that Claimant has piriformis syndrome and should undergo diagnostic injections. The presence or absence of a "Table 53 diagnosis" is of importance when determining whether or not an injured worker sustained ratable permanent medical impairment after reaching MMI. Section 8-42-107(8)(c), C.R.S.; *McClane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). However, Dr. Watson's critical finding in this case is that Claimant has never reached MMI because she needs additional diagnostic work-up for piriformis syndrome. Dr. Fall's opinion concerning the correctness of Dr. Watson's theoretical Table 53 diagnosis does not directly or substantially refute Dr. Watson's opinion concerning MMI and amounts to nothing more than a tangential attack on his credibility. The ALJ finds this attack is not persuasive because it does not address the real issue of MMI.

54. Dr. Fall's opinion that Claimant will probably not receive any benefit from the proposed piriformis injections is not persuasive. Dr. Fall admitted that Dr. Watson did the appropriate provocative testing for piriformis syndrome. In light of the positive provocative testing for piriformis syndrome Dr. Fall did not persuasively explain why further diagnostic injections should not be performed as a prelude to determining the propriety of additional treatment including Botox and/or PT. Dr. Fall was incorrect in classifying piriformis syndrome as a mere "group of symptoms" rather than an identifiable disease process. As noticed in Finding of Fact 43, the Low Back MTG recognize piriformis syndrome as a distinct medical diagnosis that can be treated by injections, including Botox injections. The Low Back MTG document that after diagnostic piriformis muscle injections Botox injections can have a positive effect on the treatment of piriformis syndrome.

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

CONCLUSIONS OF LAW

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

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

TIMELINESS OF CLAIMANT'S OBJECTION TO FAL

Relying on § 8-43-203(2)(b)(II)(A), C.R.S., Respondents contend Claimant did not file the Objection to the FAL or a N&P to select the DIME physician within 30 days of May 28, 2014. Therefore, Respondents argue the claim was closed by the filing of the FAL and Claimant is not entitled to contest the issue of MMI. Claimant contends the evidence establishes that neither she nor her counsel received notice of the FAL until August 19, 2014. Therefore, Claimant argues the claim was not closed because she timely filed the Objection and the N&P to select the DIME within 30 days of August 19.

Section 8-43-203(2)(b)(II)(A) provides that an FAL must notify the claimant that the case will be:

> "automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not

> required to file a request for hearing on the disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason.

Section 8-42-107.2(2)(b), C.R.S., provides that a party disputing a determination of the authorized treating physician must file a N&P to select the DIME "within thirty days after the date of mailing of the final admission of liability" or the "authorized treating physician's findings and determinations shall be binding on the parties and on the division." Failure of a claimant to contest the FAL by executing the procedural steps mandated by the statute may result in closure of the claim and denial of further benefits unless and until the claim is reopened. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004).

Section 8-43-203(2)(b)(II)(A) shows the "General Assembly intended for workers' compensation claimants to receive an FAL with accurate notice provided by employers or insurers." *Laboto v. Industrial Claim Appeals Office,* 105 P.3d 220, 227 (Colo. 2005). If such notice is not received the claimant's due process rights are implicated. *Id.* at 228; *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996); *Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986); *Campos v. J.C. Penney Co.*, WC 4-869-186 (ICAO June 18, 2013). Indeed, due process dictates that the claimant's attorney of record must also receive notice of critical administrative determinations that could result in a denial of a significant property interest. *Hall v. Home Furniture Co.*, *supra*; *Campos v. J.C. Penney Co.*, *supra*.

It is true that a properly addressed certificate of mailing may create a "presumption" that a document was received by the addressees. See *Campbell v. IBM Corp.*, 867 P.27 77 (Colo. App. 1993); *Allred v. Squirrell,* 37 Colo. 84, 543 P.2d 110 (Colo. App. 1974); *Talamantes v. Wright Group Event Services, Inc.*, WC 4-823-822 (ICAO July 11, 2011). However, the presumption of receipt may be overcome by the presentation of credible and persuasive evidence that the document was not actually received. *Allred v. Squirrell, supra*; *Catlow v. Dairy Farmers of America,* WC 4-866-133-01 (ICAO February 26, 2014). The question of whether an FAL was or was not received presents a question of fact for the ALJ. *Campbell v. IBM Corp., supra.*

When the presumption of receipt is overcome the time for objecting to the FAL and filing a N&P to select a DIME physician does not begin to run until the time the FAL is actually received. *Hall v. Home Furniture Co.*, *supra*; *Catlow v. Dairy Farmers of America, supra.*

As determined in Findings of Fact 45 through 48, Claimant proved it is more probably true than not that despite the certificate of mailing on the FAL neither she nor her counsel received the FAL until August 19, 2014. Thus, Claimant overcame the presumption of receipt created by the certificate of mailing. Further, because the FAL was not actually received by Claimant's counsel until August 19 the time for objecting to the FAL and filing a N&P did not begin to run until August 19. Because the Claimant's Objection to the FAL and the N&P to select the DIME physician were filed on August 20,

2014 (Findings of Fact 25 and 27) they were timely and the claim was not closed by operation of § 8-43-203(2)(b)(II)(A) and § 8-42-107.2(2)(b).

Insofar as Respondents assert that Claimant "waived" the right to object to the FAL the ALJ concludes the argument is without merit. Waiver constitutes the voluntary, knowing and intelligent surrender of a known right. *Johnson v. Industrial Commission,* 761 P.2d 1140 (Colo. 1988). Where, as here, the evidence establishes that the Claimant and her attorney did not receive timely notice of the FAL their failure to file a timely objection was not the result of a "voluntary, knowing and intelligent" decision.

OVERCOMING DIME ON MMI

Respondents contend they proved by clear and convincing evidence that the DIME physician, Dr. Watson, incorrectly found Claimant has not reached MMI. Relying principally on the opinions expressed by Dr. Fall, Respondents argue Claimant has presented with inconsistent symptoms that fluctuate, that Dr. Watson erred in finding a table 53 diagnosis and that Dr. Watson erred in determining that "piriformis injection followed by Botox is reasonable and necessary." The ALJ disagrees that Respondents overcame by clear and convincing evidence Dr. Watson's opinion that Claimant is not at MMI.

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* WC 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As determined in Findings of Fact 49 through 54, Respondents failed to prove by clear and convincing evidence that the DIME physician erred in finding Claimant has not reached MMI. Specifically, the ALJ credits the opinion of Dr. Watson that Claimant's history and physical examination are consistent with the diagnosis of piriformis syndrome. Further, the ALJ credits Dr. Watson's opinion that in light of this diagnosis it is appropriate for Claimant to undergo further diagnostic testing in the form of piriformis muscle injections as a prelude to possible Botox injections and additional PT. The ALJ infers from Dr. Watson's opinions that he believes that the piriformis injections offer a reasonable prospect for improving Claimant's pain and improving her overall function.

As determined in Findings of Fact 51 through 54, Dr. Fall's opinions are not sufficiently persuasive to establish it is highly probable and free from serious that Dr. Watson incorrectly diagnosed piriformis syndrome and improperly recommended diagnostic piriformis injections. At best, Dr. Fall's report and testimony represent a difference of opinion with Dr. Watson and the ALJ finds that Dr. Watsons' opinions are more persuasive. Neither is any of the other evidence presented sufficiently credible and persuasive to overcome Dr. Watsons' opinions concerning MMI.

REASOANBLE AND NECESSARY MEDICAL TREATMENT

Claimant requests that she be awarded the medical treatment recommended by Dr. Watson. That treatment consists of diagnostic injections in the left piriformis muscle to determine if Claimant is a candidate for Botox injections and additional PT.

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).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

Claimant proved it is more probably true than not that the diagnostic injections recommended by Dr. Watson offer a reasonable prospect for suggesting additional treatments that will relieve the ongoing effects of Claimant's condition. The ALJ credits Dr. Watson's opinion that Claimant's examination is consistent with work-related piriformis syndrome, and that diagnostic injections into the piriformis muscle offer a reasonable prospect for determining whether additional treatments are warranted. Dr. Watson's opinion is consistent with the Low Back MTG as set forth in Finding of Fact 43. Evidence and inferences contrary this finding are not credible and persuasive.

ORDER

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

1. Claimant timely objected to the final admission dated May 28, 2014. Claimant timely requested a Division-sponsored independent medical examination.

2. Respondents failed to overcome by clear and convincing evidence Dr. Watson's opinion that Claimant has not reached maximum medical improvement.

3. Insurer shall provide the diagnostic piriformis muscle injections recommended by Dr. Watson, and shall provide such other treatment as may be reasonable and necessary for Claimant to attain maximum medical improvement.

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

DATED: September 1, 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 Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Thomas G. Fry, M.D. that Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's Temporary Total Disability (TTD) benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. for willfully misleading Employer concerning his physical abilities.

FINDINGS OF FACT

1. Claimant is a 69 year old male who began working for Employer on November 21, 2013. He worked at a United Parcel Service depot in Commerce City, Colorado. Claimant's job duties involved breaking steel seals on the back of semi-trailers so the doors could be opened to access the cargo inside the truck. Breaking the seals required using a steel bar about two feet long and one inch in diameter to pry apart a steel bolt.

2. Claimant suffered a previous work-related injury to his back in 1989. He also injured his left shoulder in an automobile accident in 1999. Prior to working for Employer Claimant had not suffered any injuries to his right shoulder.

3. On December 9, 2013 Claimant suffered an admitted industrial injury to his left ring finger during the course and scope of his employment with Employer. Claimant pulled on a steel bar in an attempt to break a steel sealing bolt on the back of a trailer. The bolt bent downward but did not break. Claimant then tried to bend the bolt upward by using the steel bar and pushing on it toward the back of the truck. The bar slipped off the bolt and Claimant's left hand was smashed between the bar and the truck. Claimant noted that he also strained his right shoulder when he struck the door of the truck.

4. Claimant's left ring finger began to swell and he sought medical care on the next day. Claimant was eventually referred to Susan Morrison, M.D. for treatment and was diagnosed with a severe fracture of his left ring finger. Dr. Morrison referred Claimant to Orthopedic Surgeon Edmund Rowland, M.D. because she feared that Claimant had suffered tendon damage as a result of the injury.

5. On December 17, 2013 Claimant visited Dr. Rowland for an examination. He mentioned that he was also experiencing right shoulder pain. Dr. Rowland told

Claimant that they would watch the problem to see if it got better and address it at his next visit on December 31, 2013. Claimant had suffered pain in his right shoulder since the December 9, 2013 incident but felt it was probably just a bruise or a sprain and would go away in time. However, the shoulder pain continued to increase.

6. On December 31, 2014 Claimant returned to Dr. Rowland for an examination. Dr. Rowland concluded that Claimant had clinical evidence of a right shoulder rotator cuff tear and requested an MRI.

7. Dr. Rowland referred Claimant to Orthopedic Surgeon Mitchell Seemann, M.D. for an evaluation. Dr. Seemann specializes in shoulder injuries. He confirmed the diagnosis of a right rotator cuff tear and agreed that Claimant should undergo a right shoulder MRI.

8. On February 19, 2014 Claimant visited personal physician Ryan Flint, D.O. because Respondents had disputed that his shoulder condition was work-related and refused additional diagnostic testing or treatment. On March 10, 2014 Dr. Flint authored a note agreeing that Claimant's right shoulder condition was related to his December 9, 2013 work activities.

9. On June 3, 2014 Claimant reached Maximum Medical Improvement (MMI) and his case was closed. On October 14, 2014 Respondents filed a Final Admission of Liability (FAL) regarding Claimant's left ring finger. Claimant sought a Division Independent Medical Examination (DIME) regarding his right shoulder.

10. On July 16, 2014 the parties conducted the pre-hearing evidentiary deposition of Susan Morrison, M.D. Dr. Morrison testified that Claimant's right shoulder injury was not related to his work incident on December 9, 2013. Dr. Morrison noted that Claimant did not complain of a right shoulder problem until he visited a physician about three weeks after the accident.

11. On January 22, 2015 Claimant underwent the DIME with Thomas G. Fry, M.D. Claimant reported that he was using a breaker bar at work to open a container. His right shoulder gave way and he struck the side of a truck. Claimant experienced the immediate onset of right shoulder pain. He noted continued pain and discomfort in his right shoulder. Dr. Fry remarked that Claimant's symptoms increased significantly with flexion greater than abduction and both internal and external rotation. He also remarked that Claimant exhibited weakness of the supraspinatus tendon. Dr. Fry diagnosed Claimant with a probable supraspinatus tendon tear. He recommended a right shoulder MRI and a repair of the rotator cuff if the MRI was positive. Dr. Fry thus determined that Claimant had not reached MMI. He assigned a 12% upper extremity impairment rating that converted to a 7% whole person rating.

12. On May 12, 2015 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Dr. Lesnak reviewed Claimant's medical records and conducted a physical examination. He initially noted that Claimant did not report any right shoulder symptoms until December 31, 2013. Dr. Lesnak determined

that it was medically improbable that Claimant sustained any type of injurious event to his right shoulder while at work on December 9, 2013. He commented that, even if Claimant "slammed" his right shoulder into a truck while attempting to break a steel sealing bolt, he would not have sustained any specific injuries to his right rotator cuff. Dr. Lesnak remarked that, based on Claimant's age of 69 years, he might have had some right shoulder joint pathology that was unrelated to the December 9, 2013 occupational incident. He thus concluded that Claimant had reached MMI on June 3, 2014. Dr. Lesnak summarized that the inconsistencies in Claimant's reported medical history and mechanism of injury demonstrated that there was no medical evidence to suggest that Claimant suffered a right shoulder injury or aggravated any pre-existing right shoulder pathology on December 9, 2013.

13. Employer's Assistant Manager at the Commerce City facility Brad High testified at the hearing in this matter. He confirmed that he had observed Claimant working before the December 9, 2013 incident. Mr. High commented that Claimant had no problems performing his job duties and had never mentioned any prior problems with his left hand or right shoulder. He explained that he would not have hired Claimant if he had known that Claimant could not properly perform his job duties.

14. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013. Claimant reported to Dr. Fry that he was using a breaker bar at work to open a container. His right shoulder gave way and he struck the side of a truck. Claimant experienced the immediate onset of right shoulder pain. He noted continued pain and discomfort in his right shoulder. Dr. Fry remarked that Claimant's symptoms increased significantly with flexion greater than abduction and both internal and external rotation. He also commented that Claimant exhibited weakness of the supraspinatus tendon. Dr. Fry diagnosed Claimant with a probable supraspinatus tendon tear. He recommended a right shoulder MRI and a repair of the rotator cuff if the MRI was positive. Dr. Fry thus determined that Claimant had not reached MMI.

15. The medical records are consistent with Dr. Fry's determination that Claimant suffered a right shoulder injury as a result of his December 9, 2013 industrial incident. On December 31, 2014 Dr. Rowland concluded that Claimant had clinical evidence of a right shoulder rotator cuff tear and requested an MRI. Dr. Seemann confirmed the diagnosis of a right rotator cuff tear and agreed that Claimant should undergo a right shoulder MRI. Finally, Dr. Flint issued a note on March 10, 2014 agreeing that Claimant's right shoulder condition was related to his December 9, 2013 work activities.

16. In contrast, Dr. Morrison testified that Claimant's right shoulder injury was not related to his work incident on December 9, 2013. Dr. Morrison noted that Claimant did not complain of a right shoulder problem until he visited a physician about three weeks after the accident. Moreover, Dr. Lesnak concluded that Claimant had reached MMI on June 3, 2014. Dr. Lesnak summarized that the inconsistencies in Claimant's reported medical history and mechanism of injury demonstrated that there was no

medical evidence to suggest that Claimant suffered a right shoulder injury or aggravated any pre-existing right shoulder pathology on December 9, 2013. Although doctors Morrison and Lesnak reached different conclusions than DIME physician Dr. Fry, the record is devoid of unmistakable evidence that Dr. Fry's opinion was incorrect. The determinations of doctors Morrison and Lesnak constitute mere differences of opinion with Dr. Fry and are insufficient to overcome his conclusion regarding the cause of Claimant's right shoulder condition. Accordingly, based on the medical records and persuasive reports of Claimant's treating physicians, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fry's causation determination is incorrect.

17. Respondents have failed to demonstrate that it is more probably true than not that Claimant's TTD benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. for willfully misleading Employer concerning his physical abilities. Claimant suffered a previous work-related injury to his back in 1989. He also injured his left shoulder in an automobile accident in 1999. Prior to working for Employer Claimant had not suffered any injuries to his right shoulder. Mr. High testified that Claimant had no problems performing his job duties and had never mentioned any prior problems with his left hand or right shoulder. Furthermore, the record reveals that Claimant was not injured as a result of any prior condition. Claimant injured his left index finger and right shoulder when he pulled on a steel bar in an attempt to break a steel sealing bolt on the back of a trailer. The record suggests that Claimant did not lack the physical abilities to perform his job duties. Respondents have thus failed to produce sufficient evidence to demonstrate that Claimant acted with deliberate intent in willfully misleading Employer about his physical abilities. Accordingly, Respondents have failed to establish that Claimant's TTD benefits should be reduced pursuant to §8-42-112(1)(d), C.R.S.

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).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

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

7. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013. Claimant reported to Dr. Fry that he was using a breaker bar at work to open a container. His right shoulder gave way and he struck the side of a truck. Claimant experienced the immediate onset of right shoulder pain. He noted continued pain and discomfort in his right shoulder. Dr. Fry remarked that

Claimant's symptoms increased significantly with flexion greater than abduction and both internal and external rotation. He also commented that Claimant exhibited weakness of the supraspinatus tendon. Dr. Fry diagnosed Claimant with a probable supraspinatus tendon tear. He recommended a right shoulder MRI and a repair of the rotator cuff if the MRI was positive. Dr. Fry thus determined that Claimant had not reached MMI.

8. As found, the medical records are consistent with Dr. Fry's determination that Claimant suffered a right shoulder injury as a result of his December 9, 2013 industrial incident. On December 31, 2014 Dr. Rowland concluded that Claimant had clinical evidence of a right shoulder rotator cuff tear and requested an MRI. Dr. Seemann confirmed the diagnosis of a right rotator cuff tear and agreed that Claimant should undergo a right shoulder MRI. Finally, Dr. Flint issued a note on March 10, 2014 agreeing that Claimant's right shoulder condition was related to his December 9, 2013 work activities.

9. As found, in contrast, Dr. Morrison testified that Claimant's right shoulder injury was not related to his work incident on December 9, 2013. Dr. Morrison noted that Claimant did not complain of a right shoulder problem until he visited a physician about three weeks after the accident. Moreover, Dr. Lesnak concluded that Claimant had reached MMI on June 3, 2014. Dr. Lesnak summarized that the inconsistencies in Claimant's reported medical history and mechanism of injury demonstrated that there was no medical evidence to suggest that Claimant suffered a right shoulder injury or aggravated any pre-existing right shoulder pathology on December 9, 2013. Although doctors Morrison and Lesnak reached different conclusions than DIME physician Dr. Fry, the record is devoid of unmistakable evidence that Dr. Fry's opinion was incorrect. The determinations of doctors Morrison and Lesnak constitute mere differences of opinion with Dr. Fry and are insufficient to overcome his conclusion regarding the cause of Claimant's right shoulder condition. Accordingly, based on the medical records and persuasive reports of Claimant's treating physicians, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fry's causation determination is incorrect.

Reduction of TTD Benefits

10. Section 8-42-112(1), C.R.S. provides that benefits shall be reduced by 50% in certain circumstances. Section 8-42-112(1)(d), C.R.S. specifically provides, in relevant part:

> (d) Where the employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer.

See In re Austin, W.C. No. 4-442-486 (ICAP, Mar. 22, 2001). To establish that a violation has been willful, a respondent must prove by a preponderance of the evidence

that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003).

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant's TTD benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. for willfully misleading Employer concerning his physical abilities. Claimant suffered a previous work-related injury to his back in 1989. He also injured his left shoulder in an automobile accident in 1999. Prior to working for Employer Claimant had not suffered any injuries to his right shoulder. Mr. High testified that Claimant had no problems performing his job duties and had never mentioned any prior problems with his left hand or right shoulder. Furthermore, the record reveals that Claimant was not injured as a result of any prior condition. Claimant injured his left index finger and right shoulder when he pulled on a steel bar in an attempt to break a steel sealing bolt on the back of a trailer. The record suggests that Claimant did not lack the physical abilities to perform his job duties. Respondents have thus failed to produce sufficient evidence to demonstrate that Claimant acted with deliberate intent in willfully misleading Employer about his physical abilities. Accordingly, Respondents have failed to establish that Claimant's TTD benefits should be reduced pursuant to §8-42-112(1)(d), C.R.S.

ORDER

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

1. Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013.

2. Respondents have failed to establish that Claimant's TTD benefits should be reduced pursuant to §8-42-112(1)(d), C.R.S.

3. 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: September 21, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

PROCEDURAL HISTORY and ISSUES

The Claimant applied for hearing on the issues of compensability (although the Respondents had filed a General Admission of Liability), overcoming the opinions of the Division Independent Medical Examination (DIME) physician; medical benefits; temporary total disability (TTD) benefits; permanent partial disability (PPD) benefits; and change of physician.

On July 13, 2015, the Respondents filed a motion to reschedule the hearing citing discovery issues. The ALJ entered an order on July 22, 2015 denying the motion to continue. At the commencement of hearing on July 23, 2015, the Respondents renewed their motion to continue the hearing. After hearing statements from the parties and reviewing the file, the ALJ denied the motion to continue, but bifurcated the issues to allow Respondents to depose the DIME physician, Dr. Douglas Scott. Thus this order determines only whether the Claimant is entitled to a change of physician, and the remaining issues are reserved.

FINDINGS OF FACT

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

1. Claimant was born on June 30, 1972 and is currently 43 years old.

2. Claimant worked for the Employer as an auto body technician. On December 11, 2013, the Claimant was involved in a motor vehicle accident while taking a customer's vehicle out for a test drive. The Claimant was driving a SUV and was struck by a larger truck. The Claimant was wearing a seatbelt.

3. The Claimant initially complained of neck and shoulder pain, both of which eventually resolved. Claimant's ongoing complaints include low back pain and bilateral testicular pain.

4. The Claimant received medical treatment at Concentra first with Dr. Bird then with Dr. Sacha.

5. Dr. Sacha determined that the Claimant reached MMI on June 4, 2014 with no permanent impairment. Dr. Sacha stated, "As maintenance, he should be allowed a one-time urology evaluation. This is only at the patient's insistence. I do not see any pathology or any other reason for him to have his ongoing symptoms, but I certainly do not think that it is unreasonable to have a one-time urology evaluation as maintenance."

6. On August 7, 2014, Dr. Ericson Tentori, also a Concentra physician, reviewed Dr. Sacha's workup, and concurred with Dr. Sacha that Claimant had reached MMI. Dr. Tentori released Claimant to return to full duty work and determined he needed no additional medical treatment.

7. Both Drs. Tentori and Sacha were considered an authorized treating physician (ATP).

8. On August 20, 2014, the Respondents filed a Final Admission of Liability (FAL). The FAL specifically denied maintenance medical care per Dr. Tentori's August 7, 2014 report. The Final Admission of Liability indicates the claims adjuster's address is P.O. Box 968023, Schaumburg, IL 60196-8023.

9. Claimant objected and applied for a DIME. Dr. Scott performed the DIME and in his report, he indicated that the parties requested that he address maximum medical improvement, medical treatment and maintenance medical treatment.

10. On August 29, 2014, Claimant's attorney wrote a letter to Laura Orozco, the adjuster in this claim, and acknowledged receipt of the FAL. He requested a breakdown of indemnity payments made to the Claimant followed by a request to change Claimant's authorized treating physician to Dr. Kristen Mason. The letter contained no claim number or other identifying information other than the Claimant's name. The letter was addressed and mailed to 1400 American Lane, Schaumburg, IL 60196.

11. There is no serious dispute that Claimant's counsel mailed the letter on August 29, 2014.

12. The Employer's First Report of Injury indicates Insurer's address as 1400 American Lane, Schaumburg, IL 60196.

13. In other correspondence to the Insurer, Claimant's attorney used an address of P.O. Box 968023, Schaumburg, IL 60196-8023.

14. The Claimant's attorney also faxed correspondence to Orozco. Specifically, on June 26, 2014, the Claimant's attorney sent a letter by facsimile to Orozco requesting that she provide a copy of medical reports associated with the claim as well as the claim file. The Claimant's attorney identified a deadline for compliance with his request.

15. Because Claimant's counsel mailed the August 29, 2014 letter to the physical address for the Insurer in Schaumburg, IL, Orozco did not receive it right away. Orozco's office is located in Overland Park, Kansas.

16. A department within the Insurer's office known as the DDC, which is located in Schaumburg, IL, bears the responsibility of processing incoming mail. According to Orozco, the DDC staff stamps incoming mail, and adds it to the applicable claim.

17. The DDC date stamped the August 29, 2014 letter as received on September 12, 2014.

18. On September 29, 2014, Claimant's counsel sent a letter to Orozco by facsimile. The letter identifies the claim number assigned by the Insurer, the Claimant's name, the insured's name, and date of loss. The letter stated that Dr. Mason was the new authorized treating physician and provided her address and telephone number.

19. On September 30, 2014, Orozco denied the Claimant's request to change his physician to Dr. Mason, and sent the letter by facsimile to Claimant's counsel.

20. No evidence identified the date on which Orozco initially received the August 29, 2014 letter.

21. Claimant alleges that because the Respondents failed to timely respond to the request to change physicians, any objection by the Insurer is deemed waived making Dr. Mason the new authorized treating physician.

22. The Claimant admittedly pursued treatment with Dr. Mason to "help with pain." During cross examination, the Claimant refused to agree that he pursued treatment with Dr. Mason to "improve his condition." Regardless, the ALJ finds that Claimant sought treatment with Dr. Mason to improve his pain which is tantamount to improving his condition. Claimant wanted treatment to cure and relieve him of the affects his injury. He was not seeking treatment to maintain the condition he achieved at the time of MMI. This finding is further supported by the DIME physician's report that Claimant sought a DIME to address, among other things, MMI.

23. The Claimant did not attempt to seek treatment with any of his ATPs after he was placed at MMI nor did he request that the Insurer authorize any additional maintenance treatment.

24. The ALJ finds that based on the credible evidence, the Claimant is not entitled to a change of physician.

CONCLUSIONS OF LAW

1. 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).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

3. Section 8-43-404(5)(a)(VI), C.R.S., allows the claimant to change his or her physician upon written request to the insurer. If the insurer neither grants nor refuses permission within 20 days of the request, the insurer shall be deemed to have waived any objection to the claimant's request. The objection shall be in writing and be deposited in the mail or hand-delivered to the claimant within 20 days.

4. In this case, the Claimant's attorney made a written request to change the Claimant's physician. He mailed the letter to the Insurer's physical address in Schaumburg, IL, an address to which he had never before mailed documents regarding this claim. Not only did Claimant's attorney mail the letter to an out-of-the-ordinary address, he provided little information concerning the identity of the Claimant in the letter. In other correspondence to the adjuster, Claimant's counsel provided identifying information and sent the letters by facsimile. It is apparent from the actions by Claimant's attorney that he mailed the letter to an unusual address with little identifying information about the Claimant to cause a delay in receipt by the claims adjuster.

5. Claimant asserts that he complied with §8-43-404(5)(a)(VI), C.R.S., because the First Report of Injury identifies the physical address for the Insurer making such address essentially "fair game." While that may be true had Claimant's counsel consistently sent correspondence to that address, the ALJ concludes that under the facts presented, Claimant's counsel used such address to cause a delay in receipt by the adjuster so that she would not have adequate time to object to the request. Her inability to object would result in a waiver to any objection.

6. The parties do not seriously dispute the fact that the Insurer did not provide a written objection to the change of physician request within 20 days of the date Claimant's written request was mailed. However, the ALJ concludes that under the circumstances, the request to change physicians was not properly made. The intent of §8-43-404(5)(a)(VI), C.R.S., is for claimants to provide an insurer with proper notice of a request to change physicians and allow the insurer an opportunity to object within a reasonable period of time. The statute also grants claimants the chance to change physicians without requiring express permission from the insurer, and without having to wait an unreasonable amount of time to receive an objection. The statute does not contemplate that change of physician will automatically occur when a claimant fails to provide proper notice.

7. Section 8-43-404(5)(a)(VI), C.R.S., indicates that an insurer's failure to object to request for a change physician is deemed a waiver of any objection. Waiver is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984). Waiver may be explicit, or it may be implied, as where a party acts inconsistently with

the known right and where that action would prejudice the other parties. *Vanderbeek v. Vernon Corp.*, 25 P.3d 1242 (Colo. App. 2000); *Norden v. E.F. Hutton and Co Inc.*, 739 P.2d 914 (Colo. App. 1987); *Klein v. State Farm Mutual Automobile Ins. Co.*, 948 P.2d 43 (Colo. App. 1987); *Red Sky Homeowners Assoc. v. The Heritage Company*, 701 P. 2d 603 (Colo. App. 1984).

8. Under the facts presented, the Insurer, through its claims adjuster, was not aware of its right to object to the request to change physicians until September 12, 2014, at the earliest. In addition, once the adjuster was made aware that Claimant sought a change of physician, the adjuster issued a written objection to the Claimant's attorney. It is apparent that the Insurer did not intend to waive its right to object to Claimant's request, and did not act inconsistently with a known right. The ALJ concludes that the Insurer timely issued an objection to Claimant's request to change his physician.

9. Claimant's request to change physicians after he reached MMI was also improper. Claimant requested a change of physician for the purpose of seeking treatment to cure and relieve him from the effects of his injury not for the purpose of maintaining his condition. Claimant disagreed with his ATP's determination that he reached MMI and he pursued a DIME regarding his MMI status and need for additional treatment, including maintenance treatment. It is apparent from the record that Claimant sought a change of physician to constructively challenge the ATP's findings regarding MMI. Such a request for a change of physician when no recommendation or showing that maintenance care is needed is precluded. *Story v. Industrial Claims Appeals Office*, 89 P.2d 80 (Colo. App. 1995).

ORDER

It is therefore ordered that:

1. Claimant's request to change his authorized treating physician to Dr. Mason is denied and dismissed.

2. This matter shall be reset before the ALJ for a determination on the remaining issues. Although the ALJ entered an order requiring the parties to schedule the second hearing on or before October 30, 2015, the OAC cannot accommodate a hearing prior to October 30, 2015. As such, this matter shall be reset to commence no later than November 30, 2015.

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: September 21, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that on May 24, 2014 he sustained an injury proximately caused by the performance of service arising out of and in the course of his employment?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable and necessary medical benefits to treat the alleged injury?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing May 24, 2014?
- What is Claimant's average weekly wage?
- Did Respondents prove by a preponderance of the evidence that Claimant was responsible for his termination from employment?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 and 2 were admitted into evidence. Respondents' Exhibits A through HH were received into evidence.

2. The Employer is a temporary services agency. Claimant worked for the Employer as a laborer. The agency assigned Claimant to work at various jobsites.

3. On May 24, 2014 the Employer assigned Claimant to work at a King Soopers (KS) facility. May 24 was the second day Claimant had worked at the KS site.

CLAIMANT'S TESTIMONY REGARDING ALLEGED INJURY

4. Claimant testified as follows concerning the events of May 24, 2014. At KS he was assigned to lift "trays" from pallets. He would then sort and stack them. Between 9:45 a.m. and 10:15 a.m. Claimant bent over to lift some trays when a container of trays fell and struck him in the head, neck, shoulder, back and buttocks. He experienced a sharp pain in the middle of his back.

5. Claimant testified as follows concerning events after the incident with the trays. Claimant reported the incident to a nearby KS supervisor and told the supervisor that he could not continue working. Claimant stated he was then referred to a "head supervisor" at KS. Claimant believes the "head supervisor" was named "David." Claimant told the "head supervisor" that he couldn't work anymore. The head

supervisor told Claimant to report the injury to his Employer. Claimant then clocked out and drove to University of Colorado Hospital (UCH) for treatment.

MEDICAL RECORDS AND OTHER DOCUMENTS PRIOR TO ALLEGED INJURY OF MAY 24, 2014

6. On April 11, 2002 Claimant was seen at the Denver Health Medical Center (DHMC) emergency room for complaints of right knee pain and low back pain. These symptoms were reportedly the result of a bus accident. Claimant underwent lumbar x-rays that showed "minimal degenerative change" at L3-4 and L4-5. There was no spinal fracture.

7. On September 24, 2011, Claimant reported to UCH emergency room with complaints of neck pain, back pain and headaches. Claimant reported that he was involved in a motor vehicle accident (MVA). The low back was tender and painful. Claimant underwent spinal x-rays that revealed mild "degenerative disease and facet arthrosis" at L3-4 and L4-5.

8. From October 2011 through January 2012 Claimant underwent chiropractic treatment for low back pain and other symptoms associated with the September 2011 MVA.

9. Claimant filed a claim for damages he sustained in the September 24, 2011 MVA. In April 2012 Claimant agreed to settle the claim for $13,000.

10. On April 23, 2012 Claimant was seen at UCH for complaints of back pain. The pain reportedly began two days previously when claimant "slipped into water." The pain radiated into both lower extremities and was rated 8 on a scale of 10 (8/10). The examining physician assessed chronic back pain without evidence of neurologic compromise. Claimant was prescribed valium and Percocet.

11. On March 16, 2013 Claimant was seen at DHMC Urgent Care for a complaint of ongoing back pain of 6 months' duration.

12. On May 16, 2013 Claimant was seen DHMC for various complaints including low back pain. Claimant reported he had slipped on "wet gravel" the previous day.

13. On July 9, 2013 Claimant was seen at the Medical Center of Aurora (MCA). Claimant reported severe right low back pain. Claimant gave a history that he injured his back lifting heavy boxes at work.

14. On September 21, 2013 Claimant went to MCA and complained of injuries to the low back and right Achilles tendon. These injuries reportedly occurred the previous day (September 20, 2013) when the Claimant was riding on a bus that was hit from behind. Claimant underwent lumbar x-rays that showed "chronic severe degenerative changes" with no acute fracture. Claimant was prescribed Percocet for pain.

15. On October 8, 2013 Claimant was examined by Jerry Cupps, D.O. Claimant reported that as a result of the September 20, 2013 bus accident he had developed cervical, thoracic and lumbar pain as well as headaches. Dr. Cupps noted Claimant "denied a history of prior motor-vehicle accidents or prior work-related injuries." Dr. Cupps noted that prior to the bus accident Claimant "had no reported injuries of significance and no evidence of acute or chronic pain." Dr. Cupps assessed multiple conditions attributable to the bus accident. These included cervical, thoracic and lumbar spine pain.

16. As a result of the September 20, 2013 bus accident Claimant underwent physical therapy (PT) between October 9, 2013 and October 17, 2013. During this treatment Claimant complained of 7/10 low back pain.

17. Claimant filed a claim for damages against the driver of the vehicle that struck the bus on September 20, 2013. On October 29, 2013 Claimant agreed to settle the claim for a payment of $6,720.22.

18. On April 20, 2014 Claimant was involved in another MVA and was seen at MCA with a complaint of low back pain. Claimant was transported to the hospital by ambulance. The "clinical impression" was a lumbar sprain without sciatica or motor weakness. Claimant was initially prescribed Flexeril and Norco. However, Claimant advised the treating physician that he would not take Norco because it caused "upset." Instead, Claimant requested a prescription for oxycodone without Tylenol. The emergency room report states that the Claimant would be discharged "with the appropriate medications as requested."

19. On May 6, 2014 Claimant filed a civil suit against the driver of the other vehicle involved in the April 20, 2014 MVA. The Claimant requested $50,100 which includes damages for pain and suffering.

MEDICAL RECORDS AFTER ALLEGED INJURY OF MAY 24, 2014

20. On May 24, 2014 Claimant was examined at the UCH emergency room. Claimant gave a history that he had back pain after "getting 'trays' dropped on his back while bending over." Claimant denied radiation of pain. His range of motion was reportedly normal but the "midline and left-sided paraspinal" lumbar spine were tender to palpation. X-rays of the lumbar spine showed "no fracture or vertebral body subluxation." The emergency room physician assessed back pain and contusion. Claimant received prescriptions for Naprosyn and Percocet and was instructed to follow-up with a workers' compensation doctor.

21. On May 28, 2014 Claimant signed a form designating Aviation and Occupational Medicine (AOM) as the authorized medical provider for his injury.

22. On May 28, 2014 Michael Ladwig, D.O., examined Claimant at AOM. Claimant gave a history that on May 24, 2014 he was bent over picking up trays when some trays fell on to his back. Claimant reported that he was experiencing low back pain and numbness down in to the left leg and groin area. Dr. Ladwig noted left-sided

tenderness from T10-S1 with "slightly decreased forward flexion." Straight leg raising was negative and x-rays of the thoracic and lumbar spine were "negative for acute changes." Dr. Ladwig assessed a lumbosacral strain and, based on Claimant's history and mechanism of injury, opined that there is a "greater than 51% probability that this is a work – related injury or condition." Dr. Ladwig imposed restrictions of no lifting or repetitive lifting over 10 pounds and no forward bending. He prescribed various medications including Percocet and directed Claimant to use ice and heat.

23. On May 30, 2014 Claimant telephoned Kaiser Permanente (KP). He advised KP that he had been in an MVA the previous day (May 29) and was experiencing headaches, neck pain and lower back pain. Claimant requested to have medication prescribed over the phone "for pain and muscle spasms." The treating physician noted that he had never seen the Claimant and had no history on him. Consequently, the physician noted he was unable "to prescribe medications over the phone." An appointment was scheduled for Claimant to be examined in person.

24. On May 31, 2014 Claimant was examined at KP for complaints of headache, neck pain and low back pain. Claimant gave a history of being rear-ended in an "MVA 2 days ago." Claimant also reported he had "some numbness in the left leg" that had "resolved today." These notes contain no mention of the alleged work-related incident of May 24, 2014. On PE the examining physician noted tenderness in the lumbar paraspinals, "straight leg pos BL" and "very tight hamstrings." Claimant was prescribed a small number of Percocet and ibuprofen.

25. At hearing Claimant testified that he did not think he told KP that he was in an MVA 2 day previously. Rather, Claimant testified that he thought he told them about his workers' compensation injury.

26. On June 4, 2014 Claimant reported to Dr. Ladwig that he was experiencing numbness down his left leg. Dr. Ladwig noted a positive left straight leg test. He assessed a lumbosacral spine strain and radiculopathy. Dr. Ladwig referred Claimant for an MRI of the lumbar spine.

27. On June 12, 2014 Respondents issued a Notice of Contest and indicated the claim was "under investigation."

28. On June 16, 2014 Claimant underwent an MRI of the lumbar spine. The radiologist's impressions included: (1) Spondylosis at L3-4 and L4-5 accounting for moderate central spinal canal stenosis at L4-5 and mild central canal stenosis at L3-4; (2) Mild to moderate foraminal stenosis at both the L3-4 and L4-5 levels; (3) mildly degenerated facet joints at L5-S1; (4) No osseous trauma or spondylolisthesis.

29. On June 18, 2014 Dr. Ladwig reviewed the MRI. He referred the Claimant to Franklin Shih, M.D. for a physical medicine evaluation.

30. On July 1, 2014 Dr. Shih examined Claimant. Claimant gave a history that on May 24, 2014 he was bent over to pick up a stack of trays weighing 25 pounds when another stack of trays fell and hit his back. Claimant reported "pain in the back and the

posterior aspect of the left leg." The back pain was "predominant." Dr. Shih took a "past musculoskeletal history" and noted a right triceps tear, gout and a right foot injury in 2010. The history does not mention any previous low back problems. Claimant's medical history was "remarkable" for elevated cholesterol, thyroid dysfunction, hypertension, diabetes and gout. Dr. Shih assessed "post reported work injury" with "ongoing low back greater than left lower extremity symptomatology" and "predominantly mechanical features with mild radicular component." Dr. Shih opined the "it is unlikely the trays actually hitting the back were the primary mechanism." Dr. Shih opined it was more likely that Claimant's complaints resulted from "potentially jerking when he was hit by the trays." Dr. Shih also stated "within probability [Claimant's] current back complaints are related to the reported working injury." Dr. Shih advised Claimant of potential treatments and Claimant expressed interest in pursuing physical therapy and acupuncture.

31. On July 1, 2013 Claimant signed a form requesting a one-time change of physician to Arbor Occupational Medicine (Arbor). Claimant testified that he requested a change of physician because Dr. Ladwig referred him out to other providers and wasn't doing anything to treat his condition.

32. On July 14, 2014 Alisa Koval, M.D., examined Claimant at Arbor. Dr. Koval is board certified in occupational medicine and environmental medicine. Claimant gave a history that on May 24, 2014 when he was "in the bent-over position lifting trays from approximately floor level, a number of empty trays fell off a cart behind him and landed on his back." Claimant reported that his symptoms included dull pain throughout the lower back and shooting pain down the back of the left leg if he walked more than 30 minutes. When asked about prior treatment for back pain Claimant advised Dr. Koval that he had treatment from a chiropractor "Sometime in 2013." Dr. Koval described the Claimant as "somewhat evasive" when discussing prior back pain and treatment. Dr. Koval reported that on physical examination (PE) Claimant refused to "do many things I asked him to do because he sad it hurt his back." Dr, Koval stated that she did not "get an objective strength examination on the left" because Claimant "basically did not move" his leg. Claimant asked for a cane at the end of the examination. Dr. Koval's impressions included low back pain "likely with elements of lumbosacral strain." Dr. Koval recommended continued physical therapy (PT) and acupuncture and prescribed a muscle relaxer and an anti-inflammatory. She also referred Claimant J. Raschbacher, M.D., to get "another pair of eyes on the case."

33. Concerning the issue of causation, Dr. Koval noted that the MRI demonstrated a "multitude of degenerative changes" including "spondylosis at L3-4 and L4-5." Dr. Koval stated that she would like to review Claimant's old records before rendering a judgment on causation. Dr. Koval commented that "at first glance a lot of his changes are degenerative and have likely taken place over a much longer time period." She also wrote that the falling trays "may produce some soreness, contusion and maybe even muscle strain," but she did "not believe the degenerative changes" resulted from the incident with the trays.

34. On July 17, 2014, Claimant was seen at KP for nutrition therapy and weight management. At that time Claimant reported he was not doing any exercise because of an "automobile accident and chronic back pain."

35. On July 18, 2014 Dr. Raschbacher examined Claimant at AOM. Claimant reported "horrendous" back pain with "numbness in the back." Claimant advised he had "prior lumbar problems" but "never any numbness." Claimant had no lower extremity symptoms. On physical examination (PE) Dr. Raschbacher noted "diffuse lumbar tenderness" and that straight leg raising was negative. Dr. Raschbacher assessed lumbosacral strain. He prescribed Percocet and referred Claimant to Robert Kawasaki, M.D., for nerve conduction studies despite the absence of paresthesias.

36. On July 28, 2014 Claimant advised Dr. Raschbacher that he was scheduled for bariatric surgery at Kaiser Permanente (KP). Claimant also stated that he wanted his "narcotic pain medicines" without Tylenol. Dr. Raschbacher referred Claimant for PT and refilled the prescription for Percocet. Dr. Raschbacher also completed a Physician's Report of Worker's Compensation Injury (M164) and checked a box indicating that his "objective findings" were "consistent with history and or work related mechanism of injury."

37. On August 12, 2014 Dr. Kawasaki saw Claimant for the purpose of conducting the electordiagnostic testing prescribed by Dr. Raschbacher. Claimant gave a history that on May 24, 2014 he "was bent over lifting some empty trays when some other trays apparently fell over and landed on his back." Claimant stated that he developed low back pain and "some pain radiating down the left lower extremity." Claimant denied any prior "significant injury to his low back." However, Claimant told Dr. Kawasaki that he had some "motor vehicle accidents in the past but denied ongoing problems leading up to his injury." Dr. Kawasaki recorded that the "EMG/nerve conduction study" was normal and the test "was discussed with [Claimant] in detail." Dr. Kawasaki also noted that he reviewed Claimant's "PDMPs" and Claimant had received "frequent refills of opioid medications by multiple providers over the last year." Dr. Kawasaki further stated that in the past month Claimant had received "oxycodone/acetaminophen from three different providers."

38. On August 19, 2014 Claimant was once again examined by Dr. Koval. Dr. Koval noted that Arbor had received multiple communications from Respondents' counsel forwarding medical records from "local facilities" that reported previous injuries experienced by Claimant. Dr. Koval specifically noted medical reports documenting a low back injury in July 2013, an MVA in September 2013 and another MVA in 2014. Dr. Koval wrote that she told Claimant that "opposing counsel" was "building a significant case against him and advised him that it would probably be a good idea for him to obtain a lawyer." Dr. Koval opined that Respondents' counsel "built a reasonable case that [Claimant's] symptoms were not caused by this work-related injury." Dr. Koval further opined that "his symptoms may have been aggravated at most by this particular work-related incident, but it does seem from the medical records supplied that he did have most of these symptoms to some extent, on several occasions" prior to the May

24, 2014 "injury/incident." Dr. Koval continued PT, prescribed Percocet, imposed restrictions and referred Claimant to Dr. Raschbacher for follow-up.

39. On September 4, 2014 Dr. Raschbacher performed a "supplemental medical record review." Dr. Raschbacher reviewed Claimant's medical records dating back to April 2002.

40. Dr. Raschbacher examined Claimant on September 12, 2014 and authored a discharge note dated September 18, 2014. Claimant told Dr. Raschbacher the trays that struck him on May 24, 2014 "fell from a height of over six feet." Dr. Raschbacher advised Claimant that he had reviewed "all of the records." Claimant replied that "he was fine and that he was healthy before his most recent injury claim date" of May 24, 2014. Claimant also reported that "he never sought medical attention before" May 24, 2014 and that the April 20, 2014 MVA did not cause him any injury.

41. In the September 18, 2014 report Dr. Raschbacher stated that he did not "find a clear basis" to treat Claimant "for an injury claim from 05-24-14." Dr. Raschbacher wrote that the "mechanism of injury and the persistence of this degree of symptomatology and the use of a cane all do not make a great deal of sense to this examiner." Dr. Raschbacher further stated the Claimant had "quite an extensive history involving claims for the back" and "pre-existing, nonwork-related, degenerative changes at the spine." Dr. Raschbacher stated he did not "see any clear objective changes from the purported injury." Finally Dr. Raschbacher stated that he does not "think it is likely [Claimant] had a compensable injury." Dr. Raschbacher discharged Claimant from treatment effective September 12, 2014 and opined he had no ratable impairment or any restrictions.

42. On October 31, 2014 Claimant was examined by KP physician Alan Lidsky. Claimant reported that he experienced "chronic back pain all day every day." Claimant rated the pain as 6-7/10 and stated he had the pain "since May" when he "was at work and trays fell on his back – his workman's comp told him it was preexisting." Dr. Lidsky referred Claimant to neurosurgery for evaluation of "spinal stenosis of lumbar spine wo neurogenic claudication."

43. On December 12, 2014 Claimant was seen at KP by Daniela Grayeb M.D. Dr. Grayeb noted Claimant requested "pain medication for treatment of chronic back pain after work related injury in May and MVA x 2 in April and May 2014." Dr. Grayeb reviewed Claimant's PDMP and noted that "he has been getting narcotics and BZD from numerous providers several times a month." Dr. Grayeb opined the Claimant was engaged in "drug seeking behavior" and advised him that she would not be able to prescribe opioid medications.

44. KP scheduled Claimant to undergo bariatric surgery on April 9, 2015. However, KP cancelled the surgery because Claimant underwent a pre-surgical drug screen that was positive for "cocaine and THC." KP physician Luke Osborne, M.D., noted that cocaine and anesthesia "can lead to dangerous hemodynamic instability intra-op."

45. Claimant failed to prove it is more probably true than not that he sustained any injury while at work on May 24, 2014. Rather, the credible and persuasive evidence establishes that it is more probably true that Claimant did not sustain any compensable injury on May 24, 2014.

46. Claimant's testimony that on May 24, 2014 trays fell and struck him on the back is not credible. His testimony that the accident occurred was not corroborated by any credible and persuasive eyewitness testimony.

47. Claimant's testimony that on May 24, 2014 falling trays caused the immediate onset of low back pain is not credible. Rather, Dr. Raschbacher credibly and persuasively opined that he did not think it likely that Claimant experienced a "compensable injury." Dr. Raschbacher persuasively explained that Claimant's medical records prior to May 24, 2014 document "quite an extensive history involving claims for the back" and "pre-existing degenerative changes at the spine." Dr. Raschbacher also credibly and persuasively opined that there were not any "clear objective changes" caused by the alleged May 24 injury.

48. Dr. Raschbacher's opinions are supported by review of the pertinent medical records. As set forth in Findings of Fact 6 through 19, between April 2002 and May 23, 2014 Claimant sought medical treatment for back pain no less than 8 times. On at least 7 of these occasions Claimant reported that he sustained accidental injuries to his back. Claimant reported back injuries on the following dates: (1) Bus accident reported April 11, 2002; (2) MVA reported September 24, 2011; (3) Slip in water reported April 23, 2012; (4) Slip on wet gravel reported May 16, 2013; (5) Lifting boxes at work reported July 19, 2013 ; (6) MVA reported September 21, 2013; (7) MVA reported April 20, 2014. On May 16, 2013 Claimant went to DHMC Urgent Care and sought treatment for low back pain of 6 months' duration.

49. Moreover, the medical records corroborate Dr. Raschbacher's opinion that prior to May 24, 2014 Claimant already suffered from degenerative spinal disease. X-rays in September 2011 already showed "mild" degenerative disease and facet arthrosis. In September 2013 Claimant underwent lumbar x-rays that showed "chronic severe degenerative changes." Dr. Raschbacher's opinion is further corroborated by Dr. Koval who noted that the lumbar MRI showed a "multitude of degenerative changes" that likely occurred over a long period of time.

50. Claimant's credibility is also undermined because he has a documented history of obfuscating his medical history when seeking treatment for back problems. When Dr. Cupps examined Claimant for back problems allegedly associated with the September 20, 2013 MVA, Claimant "denied a history of prior motor-vehicle accidents or prior work-related injuries." However, the medical records establish that prior to Dr. Cupps' October 8, 2013 examination Claimant had sought treatment for back pain associated with a bus accident in 2002, an MVA in September 2011 and a work-related lifting incident in July 2013. The September 2011 MVA resulted in several months of chiropractic treatment and a settlement of $13,000. The ALJ finds it improbable that Claimant simply forgot this history when Dr. Cupps asked about it. This is especially

true because the ALJ infers that when Claimant saw Dr. Cupps in October 2013 Claimant had already made or was contemplating a claim for damages based on the September 20, 2013 MVA.

51. The ALJ infers that Claimant obfuscated his medical history when he was examined at KP on May 31, 2014. On that date Claimant sought narcotic pain medication for treatment of low back pain that he associated with a motor vehicle accident which Allegedly occurred on May 29, 2014. However, the KP record does not mention any history that on May 24, 2014, Claimant allegedly sustained a back injury at work.

52. The ALJ infers that Claimant obfuscated his medical history when he was examined by Dr. Koval on July 14, 2014. Dr. Koval credibly reported that Claimant was "evasive" when she asked about his prior treatment for back pain. Claimant merely told Dr. Koval that he received chiropractic treatment "sometime" in 2013. The ALJ finds it highly improbable that Claimant forgot about his numerous prior back injuries and the resulting treatments. See Finding of Fact 48. The ALJ finds it is more probable that Claimant was attempting to conceal his prior back problems from Dr. Koval in order to persuade Dr. Koval that the back pain was caused by the alleged work-related incident on May 24, 2014.

53. The ALJ infers that Claimant obfuscated his medical history when he was examined by Dr. Kawasaki on August 12, 2014. Although Claimant told Dr. Kawasaki that he had a few motor vehicle accidents in the past, Claimant denied "significant injury" to the low back or any problems leading up to the alleged injury of May 24, 2014. The ALJ infers from this record that Claimant failed to disclose the extent of his prior treatment for low back pain. The ALJ further infers Claimant failed to disclose the treatment, including the prescription of narcotic medication, associated with the April 20, 2014 MVA.

54. The ALJ infers that Claimant obfuscated his medical history when he was examined by Dr. Raschbacher on September 12, 2014. Dr. Raschbacher noted that Claimant stated that he never sought "medical attention" prior to May 24, 2014 and that he was not injured in the April 20, 2014 MVA. As Dr. Raschbacher credibly explained, Claimant's statements are contrary to numerous medical records.

55. Claimant's testimony is not credible because the ALJ finds that Claimant probably invented the injury as a means to obtain narcotic medication. On August 12, 2014 Dr. Kawasaki credibly recorded that he had reviewed Claimant's records and they showed Claimant had received "frequent refills of opioid medication by multiple providers over the last year." On December 12, 2014 Dr. Grayeb noted that Claimant's records showed he was receiving narcotics and "BZD" from "numerous providers several times per month." Dr. Grayeb credibly and persuasively opined Claimant was engaged in "drug seeking behavior."

56. Dr. Grayeb's opinion that Claimant has engaged in "drug seeking behavior" is corroborated by the medical records. MCA records from September 21,

2013 show Claimant was prescribed Percocet for pain. When Claimant was seen at MCA on April 20, 2014 he declined NORCO and specifically requested oxycodone without Tylenol. When Claimant reported to the UCH emergency room on May 24, 2014 he received a prescription for Percocet. On May 30, 2014 Claimant telephoned KP and requested pain medication because of an MVA the previous day. This request for pain medication, which occurred less than a week after the alleged injury of May 24, 2014, was denied until Claimant could be seen in person. Claimant was seen at KP on May 31, 2014 and he received a prescription for Percocet. The May 31 prescription for Percocet was apparently made without the physician's awareness that Claimant had received a prescription for Percocet on May 24.

57. Dr. Ladwig and Dr. Shih both opined Claimant sustained a work-related injury on May 24, 2014. Neither of these opinions is persuasive because neither physician was aware of Claimant's complete medical history prior to the alleged date of injury. Moreover, Dr. Shih based his opinion on the supposition that Claimant "jerked" when was struck by falling trays. However, the Claimant did not testify that he "jerked" and has consistently given the history that the injury was caused by trays striking his back. Dr. Shih himself stated that trays striking the Claimant's back is not a likely mechanism of injury.

58. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

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

COMPENSABILITY OF ALLEGED INJURY

Claimant contends that the evidence demonstrates that he sustained an injury to his low back when a stack of trays fell on him while he was at work on May 24, 2014. Respondents contend that the evidence establishes the Claimant probably did not experience any accident while he was at work on May 24, 2014. Respondents further contend that if the Claimant experienced an accident he failed to prove that the accident caused any compensable injury. The ALJ agrees with Respondents that Claimant failed to prove that he suffered any accidental event while he was at work on May 24, 2014.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether 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).

As determined in Findings of Fact 45 through 57, Claimant failed to prove it is more probably true than not that on May 24, 2014 he sustained an injury proximately caused by the performance of service arising out of and in the course of his employment. The ALJ concludes Claimant's testimony that he sustained a back injury when the trays fell is not credible and persuasive. As found, Claimant's testimony that he sustained an injury on May 24, 2015 is not corroborated by any credible eyewitness evidence. The Claimant's testimony is not credible and persuasive because the medical records show he obfuscated his medical history on several occasions. Further, the ALJ is persuaded that Claimant's credibility is undermined because his drug seeking behavior provided a substantial motive to falsely report the alleged injury of May 24, 2014. Finally, the ALJ credits and is persuaded by Dr. Raschbacher's opinion that, based on his examination findings and review of the medical records Claimant probably did not suffer a compensable injury on May 24, 2014.

Based on these findings of fact and conclusions of law the claim for benefits must be denied and dismissed. In light of this determination it is unnecessary to address the other issues raised by the parties.

ORDER

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

1. The claim for workers' compensation benefits in WC 4-952-006-03 is denied and dismissed.

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

DATED: September 10, 2015

DIGITAL SIGNATURE:

David P. Cain

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

STIPULATIONS

1. If the Claimant's claims are found to be compensable, the Claimant is entitled to TPD and TTD in amounts to be determined. The parties agree to hold the issues of TPD and TTD in abeyance pending a ruling on compensability.

ISSUES

The issues for determination are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she sustained a compensable injury to her back on December 2, 2013.

2. Whether the Claimant has proven, by a preponderance of the evidence, that she sustained a compensable injury to her back, right shoulder and upper back/cervical spine on January 9, 2014.

FINDINGS OF FACT

1. The Claimant was employed by Employer as a Special Education paraprofessional who assists teachers with students who have special needs. Her duties vary by student, but include taking the students out, feeding students, changing diapers, etc. The paraprofessionals are assigned to specific children whom they assist.

2. In addition to working for Employer, during the relevant time period around and after the time of reporting a work injury, the Claimant worked part time as a child supervisor at KinderCare and performed cleaning for approximately 15 hours a week for Better Business (Claimant's Exhibit 4, p. 9; Respondents' Exhibit B, p. 2). The Claimant testified that she is still employed at KinderCare but she is no longer employed by Better Business because she cannot mop, sweep and vacuum or reach into tight places due to pain.

3. The Claimant testified that on December 2, 2013, she was working with a student who did not want to walk and he kept dropping himself to the floor. She testified that she was taking this student out and would walk him two times per day using a gait trainer (like a walker). The Claimant testified that she stood behind the student in a bent over position to guide the gait trainer to assist the student. Because the student did not want to walk, the Claimant had to use both hands to guide the student in the gait trainer even though she would only have needed to use one had if the student were cooperating. The Claimant testified that she had worked with this particular student for 4

years and he was 10 years old at the time and about 80-90 pounds and about 5'2'' in height. Since the student did not want to walk on this day, he would drop to the ground and the Claimant had to pick him up several times to get him back to the classroom. On cross-examination, the Claimant further described that when the child "crumpled" to the floor, his legs would be splayed to the side and he was sitting on his haunches and she would have to pick him up by his armpits. As she picked him up, the child would pick up his feet because he didn't want to walk.

4. The Claimant testified that her back was hurting on December 2, 2013, but she didn't report it right away because in the past when her back was hurting she would ice it and rest and it would get better. Winter break was about to start on December 17th and would continue until around January 5th. The Claimant testified that she believed that her back would get better since she would have time to rest over the break.

5. The Claimant's testimony regarding the mechanism of injury on December 2, 2013 of having to repeatedly pick up and physically support a special needs child she was assisting with walking with a gait trainer to be credible and generally consistent with her statements in the medical records. Her testimony regarding her symptoms and their progression is also credible as is the Claimant's initial belief that her back condition might get better with rest over an upcoming winter break from school. The Claimant's testimony on these matters is found as fact.

6. The Claimant testified that she returned to work after break on January 7, 2014 and, on January 9, 2014, she was working with the same student that she walked with on December 2, 2013. On January 9, 2014, he wouldn't walk at all. He also picked up the gait trainer as if to throw it. The Claimant testified that she was trying to keep him from falling and her back was arched as she came up behind him to hold him up. She testified that she screamed for help and felt pain immediately. The immediate pain was in her low back. Then, later when the low back symptoms calmed down a little, the Claimant began to notice neck and shoulder pain. On cross-examination, the Claimant testified that when the child was throwing a fit, she was trying to hold him and he thrust his head back and it struck the Claimant's right shoulder.

7. The Claimant testified that, again, she did not report a back injury right away because she felt that if she iced the back and rested, it would get better. She testified that over the following days, she reported the incident and had some additional help with this student.

8. The Claimant's testimony regarding the events of January 9, 2014 about when she was injured while working with the same special needs child that she was working with in December 2013 is credible. Her testimony regarding the change to her condition as a result of the January 9, 2014 work incident is also credible and found as fact.

9. The Claimant submitted an Employee Report of Injury/Incident on January 15, 2015 listing a date of injury/incident of "Monday Dec 2nd to present 1/15/14." She

reported that the student with whom she worked had regressed in August after returning to school with weak and unsteady legs that made walking difficult for him. She reported that she made progress with him up until Thanksgiving break, but when he returned to school after that break, the student had a hard time walking. He was not willing to walk and would drop to the floor and she had to pick him up. The Claimant reported that her back got a little better over winter break but then after that, the student was even less interested in walking and she often had to support the student's weight so he wouldn't fall. The Claimant reported her back was in "agony" since then. The Claimant noted that most of the other teachers and paras and staff had witnessed the difficulty the Claimant had with this student (Claimant's Exhibit 11). On redirect examination, the Claimant testified that she first verbally reported an injury on January 9, 2014 and then made the written report on January 15, 2014. She initially did not want to make a report but testified that other teachers told her that she should.

10. The Claimant testified she has had previous low back injuries and three workers' compensation back claims with surgeries. She testified that she had a back claim in 1990 and subsequent low back injuries in 1993 and 1996. As a result of these injuries in the 1990's, the Claimant underwent surgeries and was treated with a variety of narcotic medications including Tramadol, Percocet, OxyContin and Fentanyl patches. In 2006, the Claimant had a stomach/bile duct condition that required surgery. Due to the chronic abdominal pain, she continued to be treated with narcotic medications. However, for a period from 2005 – 2007, she testified that she was off all medications and only went back on the narcotic pain medications for the stomach/bile duct condition.

11. The Claimant testified that she had a prior low back injury in 2010 while working with a different Special Education child when employed by Employer. Treatment for that injury was one injection to the sciatic nerve and then she was better after this and placed at MMI with no restrictions or continuing care. The medical records in evidence are consistent with the Claimant's testimony.

12. Prior to December of 2013, the Claimant described her low back pain as constant but it could be controlled by pain medications and the pain was limited to her very low back, almost to her buttocks. To the extent that she had leg and hip pain from the injuries in the 1990's and 2010, the Claimant testified that it was on her left side. She testified that she previously had numbness in her hips but it went away and she has not had this for 6 years. After December of 2013, the Claimant describes her pain as higher up and it also goes down her right leg. She testified that she now also has muscle spasms at night and her right leg burns and feels like it is on fire. The Claimant further testified that prior to January of 2014, she had no shoulder pain and now it hurts to lift her arm above her head and the pain in her biceps hurts almost all the time. The Claimant testified that she had never received treatment for neck pain before and now her neck pain starts in the middle of her neck and radiates down to her shoulders.

13. On January 16, 2014, the Claimant saw Dr. Randolph Reims for an initial consultation. The Claimant reported that she was experiencing recurrent and worsening low back pain since 12/02/2013 due to difficulty with assisting a disabled child who she

repeatedly had to physically lift which is exacerbated every time she has to lift the child. On examination, Dr. Reims noted muscle spasms. Dr. Reims assessed recurrent low back pain and opined that "the exacerbation described by the patient as repeatedly lifting a child who weight in excess of 80 pounds would be consistent with the patient's described increase in her pain." Dr. Reims referred the Claimant for physical therapy and an MRI of the lumbar spine (Claimant's Exhibit 4, pp. 9-10; Respondents' Exhibit B). The Claimant testified that when she saw Dr. Reims on this occasion, she only spoke about the back pain and didn't mention the neck and shoulder pain because at first it was not as bad as the back pain and she didn't get concerned about it until it got worse. The Claimant also testified that in addition to telling Dr. Reims about repeatedly lifting the child, she also told him about the specific incident with the gait trainer.

14. On January 22, 2014, the Claimant returned to Dr. Reims and reported that she was injured on January 9, 2014. She reported that on that day she was working with a special needs student with a walker and that the student lifted the walker which then collapsed causing him to fall back onto Claimant. She told Dr. Reims she experienced immediate onset of right sided upper back pain and right shoulder pain. On physical examination, Dr. Reims found increased tone in the right upper trapezius and right levator scapula muscles. Dr. Reims diagnosed a right shoulder strain and recommended initiating physical therapy and concluded that it was probable that Claimant had suffered a work related injury. The pain medications the Claimant already took for her chronic pain were not altered (Claimant's Exhibit 4, pp. 12-14; Respondents' Exhibit C).

15. An MRI of the Claimant's lumbar spine taken on January 27, 2014 demonstrated a central posterior disc protrusion at L4-L5 which was new compared to a previous MRI on October 9, 2010. The radiologist noted that "since 2010, there has been development of a central posterior protrusion at L4-L5 associated with multifactoral central canal stenosis" (Claimant's Ex. 8, pp. 52-53; Respondents' Exhibit E).

16. On January 30, 2014, Dr. Reims noted that the Claimant reported that she was about the same. She reported pain in her right shoulder, right upper back and lower back with the right upper back pain being the most severe. After physical examination, review of the MRI showing a new central L4-5 disk protrusion, and a review of treatment options, the Claimant expressed a preference to avoid further surgery and Dr. Reims was in accord. Dr. Reims recommended a physiatry consultation and continued the Claimant's work restrictions limiting lifting and carrying to 10 lbs. and avoiding work over shoulder level (Respondents' Exhibit G).

17. On February 18, 2014, an MRI of the Claimant's cervical spine showed findings at C4-5 of a central disc extrusion with extension below the disc pace and mild spinal canal narrowing (Claimant's Exhibit 9, p. 55; Respondents' Exhibit J).

18. The Claimant saw Dr. Reims again on February 27, 2014 and reported she was working within her restrictions. The cervical spine MRI results were reviewed

with the Claimant and Dr. Reims characterized the findings as “reassuring.” On examinations, there was some tenderness of the posterior cervical musculature but no spasm on either side (Respondents’ Exhibit K).

19. In March of 2014, the Claimant saw Dr. Christopher Morelli of Spine West for physiatry evaluations and consultation. Based on a review of the available diagnostic imaging, Dr. Morelli recommended a lumbar ESI for diagnostic and therapeutic purposes since the Claimant was reporting no improvement with conservative treatments. The lumbar transforaminal epidural steroid injection was performed on March 12, 2014. The Claimant reported no benefit with this injection and, on March 28, 2014 a caudal epidural steroid injection was performed (Respondents’ Exhibits M, O and R).

20. On April 10, 2014, Dr. Reims responded to interrogatories from the Insurer’s claims specialist opining that he did not foresee changes to the Claimant’s work restrictions as she continued to be highly symptomatic in her low back, upper back and right shoulder and conservative measures, including 2 injections, have not yet brought about any significant improvement (Respondents’ Exhibit S).

21. On May 22, 2014, an MRI of the Claimant’s right shoulder demonstrated mild-moderate supraspinatus and mild infraspinatus tendinopathy and slight downsloping acromion abutting the supraspinatus tendon. The subscapularis tendon and long head of the biceps were intact and there was no atrophy of the rotator cuff muscles (Claimant’s Exhibit 9, p. 56; Respondents’ Exhibit X).

22. The Claimant saw Dr. Reims on May 28, 2014 reporting that she was improving and that bilateral SI injections performed by Dr. Gronseth provided full relief for a few hours and a return of pain but lessened pain for about a week. Dr. Reims recommended additional physical therapy and an orthopedic consult with Dr. McCarty for her right shoulder (Respondents’ Exhibit U).

23. AN EMG performed by Dr. Joshua Ward on June 27, 2014 showed no evidence for bilateral lumbosacral radiculopathy, right peroneal or tibial neuropathies or peripheral neuropathy with normal nerve conduction studies (Respondents’ Exhibit V, p. 86).

24. On July 16, 2014, Dr. Reims noted that, in the interest of being thorough, he believed that a spine surgery evaluation was appropriate for the lumbar spine and cervical spine area (Respondents’ Exhibit BB). The Claimant saw Dr. Matthew Gerlach on September 8, 2014 per this referral. After reviewing diagnostic imaging and a physical examination, Dr. Gerlach opined that “cause for the patient’s intractable pain is not clear. I suspect etiology is multi-factorial. Further surgery is likely not going to be recommended. However xrays today suggest possible pseudoarthrosis of the patient’s prior L5-S1 fusion.” Dr. Gerlach requested a CT scan of the lumbar spine for more definitive evaluation (Respondent’s Exhibit FF).

25. On September 16, 2014, a CT scan was performed and compared to the Claimant's January 27, 2014 MRI. By way of comparison, "no substantial interval change" was noted and the fusion at L5-S1 was intact (Respondents' Exhibit GG).

26. On October 8, 2014, Dr. Reims noted the Claimant reported improvement. Although she still reported pain in the right shoulder and low back, her pain has been less marked since she was taken off work completely by Employer. At the time she was still working one of her jobs approximately 15 hours per week (Respondents' Exhibit KK).

27. On October 20, 2014, Dr. Gerlach reviewed the results of the Claimant's CT scan with her and advised that the "cause for the patient's chronic pain does not have definitive structural explanation," thus, there was no indication for further surgical treatment and the Claimant was advised to continue conservative management (Respondents' Exhibit LL).

28. On November 3, 2014, Dr. Eric McCarty performed another steroid injection in her biceps. He also noted that given the Claimant's response to her previous biceps injection, the Claimant may have a component of impingement (Respondents' Exhibit NN).

29. On December 2, 2014, Dr. Carlos Cebrian performed an independent medical examination of the Claimant and authored a written report. Dr. Cebrian took a history from the Claimant related to her preexisting chronic conditions and regarding work incidents on December 2, 2013 and January 9, 2014. The Claimant described working with a special needs child on walking in a walker. Dr. Cebrian noted the Claimant reported that the child became stubborn about not wanting to participate in walking with the walker after returning from Thanksgiving break and he would drop to his knees and she would have to assist him back up. This would occur multiple times as they were walking with the walker and the Claimant would repeatedly help him to stand up (Respondents' Exhibit PP, p. 362). Dr. Cebrian noted that the Claimant reported that in December of 2013, she had low back pain on the left side of her low back that radiated down to both legs to her big toes and the symptoms were gradually getting worse. She reported that her condition improved after December 19, 2013 when the school was closed for winter break. Dr. Cebrian noted that the Claimant returned to work on January 7, 2014. On January 9, 2014, the Claimant reported assisting the same student with walking in a walker. Dr. Cebrian noted that the Claimant told him the student was again reluctant to walk and when they returned to the classroom, the student got upset and picked the walker up above his head as if he were going to throw it. The Claimant told him she was standing behind the student and he fell backwards into her and his head hit her over the right clavicle. She held him up for a few minutes and bent backwards in order to hold him up. She yelled for help and someone came so she and the student did not fall to the ground. After this, the Claimant reported to Dr. Cebrian that she felt excruciating pain in her low back, on the left side and in the middle, and in her right shoulder with radiation into her right arm after this incident (Respondents' Exhibit PP, pp. 362-363).

30. As part of his IME report, Dr. Cebrian also included a review of some recent medical records from 2011 forward. Of note, Dr. Cebrian expresses surprise that there was no mention of a 1/9/2014 incident at the time of the evaluation with Dr. Reims on 1/16/2014 even though this involved the same child from the 12/2/2014 incident (Respondents' Exhibit PP, pp. 368). On physical examination, Dr. Cebrian noted that pain behaviors were present. On examination of the cervical spine, Dr. Cebrian noted full range of motion with mild discomfort on movement to the left but no spasms, trigger points or atrophy (Respondents' Exhibit PP, p. 378). Examination of the bilateral shoulder revealed decreased range of motion of the right shoulder, negative impingement signs and mild tenderness to palpation laterally in the shoulder with normal range of motion of the left shoulder (Respondents' Exhibit PP, p. 378). Examination of the lumbar spines revealed no swelling, bruising or redness, but a large central scar from the lower thoracic spine to the sacrum. Tenderness to palpation was noted, left greater than right and the Claimant had pain into the left paraspinal muscles in the left side of the pelvis. The Claimant reported pain on all movements during range of motion measurements and leg raises (Respondents' Exhibit PP, pp. 378-379). Dr. Cebrian found no diagnoses of the Claimant to be claim related. He found she had chronic lumbar spine pain, depression, biliary bypass surgery, irritable bowel syndrome, chronic pain disorder, widespread and diffuse pain right shoulder/trapezius, cervical spine degenerative disease and opioid dependence (Respondents' Exhibit PP, p. 379). With respect to the Claimant's lumbar condition and need for treatment, Dr. Cebrian finds the current symptoms related to this condition is independent and unrelated to work activities (Respondents' Exhibit PP, p. 381). As for the Claimant's cervical and right shoulder/upper back conditions, Dr. Cebrian opines that the Claimant's subjective pain complaints have been out of proportion to the objective pathology. He believes that the Claimant has widespread myofascial pain, degenerative disease, a chronic pain disorder and opioid dependence. Therefore, he opines that the Claimant's right shoulder, trapezius and cervical spine complaints and any need for treatment are independent and unrelated to the Claimant's work activities (Respondents' Exhibit PP, p. 384).

31. On March 19, 2015, Dr. Caroline Gellrick performed an independent medical examination of the Claimant and she authored a written report. As part of the IME, Dr. Gellrick reviewed the Claimant's prior medical records and summarized records pertinent to the Claimant's claimed work injuries. Dr. Gellrick noted injuries and treatment to the Claimant's low back at L5-S1 in 1990, 1993, 1995, 2000, 2008 and 2010 as well 2014. Dr. Gellrick's review confirms an understanding of the Claimant's complicated preexisting condition (Claimant's Exhibit 7, pp. 41-46). In reviewing the Claimant's pain management questionnaire with the Claimant, Dr. Gellrick notes the Claimant reports (after correcting some errors in her written questionnaire) to being symptomatic for neck pain since January 9, 2014, for mid-back pain since December 2013, for low back pain since December 1990, left leg pain since December 2013, right arm pain since January 2014 and right leg pain since December 2013 (Claimant's Exhibit 7, p. 46-47). In the course of the IME, the Claimant described her injury to Dr. Gellrick as starting in December of 2013 when she was working with a special needs child using a walker and he kept falling to his knees and she had to keep picking him up

and helping him and she gradually developed worsening low back pain. The pain improved over the winter break when the school was on vacation, but when she returned to work in January 2014, there was another incident with the same child who picked up his gait trainer to throw it and he fell backwards on the Claimant, landing and pushing up against her right shoulder and causing her to arch her back. Since the second incident, the Claimant reported to Dr. Gellrick that her treatment and pain has continued and worsened in her low back, lower thoracic spine and her right shoulder (Claimant's Exhibit 7, pp. 47-48).

32. Dr. Gellrick diagnosed the Claimant with chronic low back pain status post six surgeries, right shoulder contusion/sprain, cervical spine pain most likely referred from the right shoulder contusion/sprain, opioid dependency managed by the Claimant's PCP, and chronic abdominal pain. In responding to interrogatories as to causation for both the December 2013 and January 2014 incidents, Dr. Gellrick opined that the Claimant suffered a temporary worsening of her low back pain as a result of the December 2, 2013 incident. Per the Claimant's admission, Dr. Gellrick concluded that for the most part, the pain subsided during the Claimant's holiday break. Dr. Gellrick then went on to conclude that the January 9, 2014 incident was the "straw that broke the camel's back." She opined that this incident caused a "marked worsening of condition" and concluded that the Claimant's current condition related to the January 9, 2014 incident. Specifically, Dr. Gellrick found that Claimant injuries to her low back and right shoulder as a result of the January 9, 2014 incident are the ongoing cause of the Claimant's worsened and aggravated condition (Claimant's Exhibit 7, pp. 49-51).

33. Dr. Carlos Cebrian testified at the hearing as an expert witness in the areas of occupational medicine, family medicine and as to matters related to Level II accreditation. He testified that he performed an IME of the Claimant on November 13, 2014. For his IME, he reviewed limited medical records and had not received any past medical records for the Claimant. After the IME, Dr. Cebrian received the Claimant's past records and some updated medical records. Dr. Cebrian testified that he understands that the Claimant's two consolidated workers' compensation claims involve the following body parts: lumbar spine, cervical spine, right shoulder and upper back.

34. In terms of the Claimant's low back diagnosis, he opined that the Claimant has low back pain, radiculopathy, facet problems and back strain. Regarding the Claimant's testimony as to her mechanism of injury, Dr. Cebrian commented on whether or not the stated mechanism of injury was likely to have led to a change in the Claimant's preexisting condition. In comparing her lumbar MRI of 1/27/2014 to prior MRIs, he opines that the only significant change was a disk bulge at L4-L5 which is the level right above her prior fusion. He notes that there is "calcification" at the disk protrusion which indicates that this isn't a new or acute problem. Additionally, Dr. Cebrian testified that the fact that 6 months after the incident the Claimant is not objectively improving and reports worsening is indicative that these symptoms are not part of an acute injury or permanent exacerbation, but rather part of her chronic pain issues. Dr. Cebrian also opined that Dr. Reims and the Claimant's other treating physicians are responding to her subjective complaints. He testified that, while they are

well-meaning, no treatment they are providing is giving the Claimant more than temporary relief and they need to look at the bigger picture. Ultimately, it is Dr. Cebrian's opinion that there is no objective evidence to support aggravation or acceleration of the Claimant's prior chronic back condition.

35. With respect to the Claimant's shoulder/cervical spine/upper back condition, Dr. Cebrian testified that it was significant to him that the Claimant did not specifically describe the 1/9/14 incident with the disabled child to Dr. Reims at her initial appointment with him on 1/16/2014 as this was a more recent incident that the December incident as relates to the doctor appointment. Dr. Cebrian also testified that the findings on the 2/18/2014 cervical MRI are relatively mild and generally expected with the Claimant's age. He noted the shoulder MRI should some hypertrophy but that these are relatively mild findings. Dr. Cebrian testified that there was no pathology to explain the Claimant's reported symptoms. He noted that about one year later, there was some evidence of disk changes but that this was due to the Claimant's underlying, preexisting condition and not to an incident on 1/9/2014.

36. Dr. Cebrian testified that pain is a subjective complaint, so, when making treatment decisions, you need to correlate pain scale reports to objective findings. At the time the Claimant appeared for her IME with Dr. Cebrian, she was reporting a pain level of 9, but Dr. Cebrian found the Claimant was able to sit through his examination, albeit with some pain behaviors. Dr. Cebrian further testified that the fact that there has been no decrease in the Claimant's pain levels in spite of the conservative treatment she has received is indicative that there has been no substantive change. He also testified that he finds some evidence of narcotic misuse, including a September 2014 medical record of the Claimant wearing 2 Fentanyl patches with a high level of alcohol in her symptom. Ultimately, Dr. Cebrian testified that he finds that the Claimant's levels of pain as she describes them do not justify the amounts of pain medications she has been prescribed. Dr. Cebrian also testified that, even to the extent that the Claimant sustained a compensable injury, no surgical treatment is indicated and no further treatment should occur for her lumbar or shoulder conditions. With respect to a thoracic or low back condition, the Claimant's mechanism of injury could have resulted in some injury, but this should have resolved in a few days and no further treatment is indicated.

CONCLUSIONS OF LAW

Generally

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

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Co v. Cline,* 98 Colo. 275, 57 p.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 138 P.3d 684 (Colo. App. 2008; *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

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). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant Suffered a Compensable Work Injury on December 2, 2013

A preponderance of the evidence indicates that Claimant suffered an acute exacerbation of her pre-existing low back condition on December 2, 2013. It is undisputed that Claimant suffered from severe, chronic low back pain for which has been treated with Tramadol, Percocet and Duragesic patches. However, the medical evidence supports the Claimant's testimony that, prior to December 2, 2013, the Claimant's low back condition was stable. In the several years prior to 2013, the Claimant's pain management physician maintained Claimant on the same dosages of Tramadol, Percocet, and Duragesic patches and she did not receive any treatment other than her ongoing prescription medications.

This ALJ also notes that Claimant continued to work three jobs without restrictions, without increased subjective complaints of pain, and without the need for additional invasive medical procedures until the work incidents involving the special needs child the Claimant was assisting on December 2, 2013 and January 9, 2014. Also relevant to this conclusion is the fact that in January 2011, the Claimant was released from care under a workers' compensation claim, without permanent impairment, permanent restrictions, and without recommendations for ongoing medical treatment.

In reaching this conclusion, this ALJ credits the testimony of the Claimant regarding the incident on December 2, 2013. On that date, after months and years of regularly having to pick up this particular student, the Claimant suffered an aggravation of her pre-existing degenerative disc disease after a particularly difficult day when the student was showing no interest in walking with the gait trainer and kept dropping to the ground requiring the Claimant to assist him in getting back up.

In addition to Claimant's testimony, the weight of the medical evidence, particularly the opinions of Dr. Gellrick and Dr. Reims, supports this conclusion. Dr. Gellrick and Dr. Reims opined that the Claimant suffered an acute exacerbation of her degenerative disc disease as a result of this incident. The ALJ credits the opinions of these physicians, particularly Dr. Reims as the treating physician, over that of Dr. Cebrian, whose opinions in this case are found to be less persuasive.

The Claimant suffered a Compensable Work Injury on January 9, 2014

The Claimant also established by a preponderance of the evidence that on January 9, 2014 she suffered an acute exacerbation of her pre-existing low back condition and a shoulder/upper back/cervical injury. Again, it is not disputed that the Claimant suffered from severe, chronic low back pain for which has been treated with Tramadol, Percocet and Duragesic patches. However, the medical evidence shows that prior to December 2, 2013, Claimant's low back condition was stable.

Per the opinion of Dr. Gellrick, the Claimant suffered a worsening of her low back pain as a result of the December 2, 2013 incident. Dr. Gellrick concluded that for the most part, the pain subsided during the Claimant's holiday break. Dr. Gellrick then went on to conclude that the January 9, 2014 incident was the "straw that broke the camel's back." She opined that this incident caused a "marked worsening of condition" and concluded that the Claimant's current condition related to the January 9, 2014 incident. Specifically, Dr. Gellrick found that Claimant injuries to her low back and right shoulder as a result of the January 9, 2014 incident are the ongoing cause of the Claimant's worsened and aggravated condition. Dr. Reims, the Claimant's treating physician repeatedly concluded that it was probable that the Claimant had suffered a work related injury related to her low back and shoulder/upper back/cervical conditions.

Respondents, by way of Dr. Cebrian's testimony, contend that the Claimant did not report the January 9, 2014 incident to Dr. Reims on January 16, 2014 and argued that the Claimant's testimony regarding this incident is not credible. However, the ALJ credits the testimony of the Claimant regarding the accident on January 9, 2014. The Claimant's testimony does not contradict the Claimant's report to Dr. Reims on January 16, 2014. The Claimant's report indicated that the student frequently dropped to the ground and that these incidents had continued even after December 2, 2013. The incident on January 9, 2013 involved similar circumstances to previous incidents with the exception that on January 9th, the special needs student lifted the gait trainer off the ground. It is also noteworthy that prior to the appointment with Dr. Reims, the Claimant reported this incident to her supervisor both verbally and in writing. She was certainly aware of this incident when she went to Dr. Reims for the first time and her testimony that she was focused on the low back condition because that was the most painful at the time is reasonable and believable.

In addition to the Claimant's testimony, the weight of the medical evidence, particularly the opinions of Dr. Gellrick and Dr. Reims, supports this conclusion. Dr. Gellrick and Dr. Reims opined that Claimant suffered an acute exacerbation of her chronic conditions as a result of this incident. This ALJ credits the opinions of these physicians over that of Dr. Cebrian.

The mechanism of injury described by the Claimant during testimony at the hearing, which is consistent with her description to medical providers, is not contested and, it is a mechanism of injury that is consistent with the physical findings on examination. The injury was significant enough to require significant work restrictions.

Based upon the Claimant's uncontroverted and supported testimony and the medical records confirming the Claimant's physical condition, it is found that the Claimant suffered a compensable injury on January 9, 2014.

ORDER

It is therefore ordered that:

1. The Claimant's suffered a compensable injury on December 2, 2013.

2. The Claimant suffered a compensable injury on January 9, 2014.

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, 1523 Sherman Street, 4th Floor, Denver, Colorado 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301, C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at:
http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. W.C. 4-953-502

ISSUES

- Whether the Division independent medical examiner's permanent medical impairment rating has been shown by clear and convincing evidence to be erroneous, and if so, what the correct permanent medical impairment rating is.

- Whether the claimant's permanent partial disability award should be based on the statutory schedule, Section 8-42-107(2), or on a whole person medical impairment rating pursuant to Section 8-42-107(8).

FINDINGS OF FACT

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

1. Claimant has been employed as a police officer for Employer for nine years.

2. His duties include patrolling Auraria college campus, controlling traffic, providing security and making arrests.

3. On March 29, 2014, Claimant sustained a compensable left shoulder injury in a motor vehicle accident. The claimant is right handed, so his injury was to his non-dominant arm.

4. Claimant was treated by Dr. Kalevik at HealthOne. An MRI revealed a partial thickness rotator cuff tear. Claimant was referred to orthopedic surgeon, Dr. Bajesh Bazaz who referred Claimant to physical therapy. When that did not alleviate Claimant's symptoms, Dr. Bazaz injected Claimant's shoulder. This was also unsuccessful. On July 17, 2014 Dr. Bazaz performed arthroscopic subacromial decompression and rotator cuff repair. Claimant returned to physical therapy from August 5, 2014 through December 16, 2014.

5. Claimant was off work for six weeks and then did modified duty for another month. At that point the Claimant asked for and received a full-duty release from Dr. Bazaz.

6. On December 16, 2014 Dr. Kalevik placed Claimant at maximum medical improvement and gave him a 3% upper extremity impairment. This converted to a 2% whole person rating. Respondent filed a final admission of liability dated January 8, 2015 wherein they admitted for the 3% upper extremity rating. Claimant objected to the final admission and requested a Division IME.

7. Dr. Greg Reichhardt was selected to perform the Division IME. He examined Claimant on April 27, 2015 and issued a report the same day. Dr. Reichhardt agreed with the date of maximum medical improvement but found that Claimant had an 8% left upper extremity rating as a result of the shoulder injury which converted to 5% as a whole person.

8. Respondents filed an application for hearing to overcome the Division IME doctor's opinion by clear and convincing evidence pursuant to §8-42-107 C.R.S. In his Response to Hearing Application, Claimant listed the issue of conversion of the extremity rating to a whole person.

9. Claimant testified at hearing that he suffered pain in his left shoulder blade. This is made worse when he directs traffic with his left arm or forcibly detains people, which require him to use his left arm in a forceful manner. Claimant testified that he has pain across the top of his shoulder and in to the front of his chest when he makes right turns while driving. Also, he experiences pain into the front of the left side of his chest when he patrols by bicycle because he has to lean forward onto the handlebars.

10. Pain diagrams filled out by Claimant when he was treated at HealthOne consistently showed pain on the top or back of the shoulder between the glenohumeral joint and the neck. This was consistent with Claimant's testimony at hearing. No pain diagram shows pain in Claimant's left arm.

11. Dr. Reichhardt stated in his DIME report that Claimant has pain over the lateral aspect of the shoulder, spasms across the shoulder blade, and aching over the anterior shoulder. He does not reference pain in the arm.

12. Based upon his range of motion testing, Dr. Reichhardt found that the Claimant had an 8% upper extremity impairment which converts to a 5% whole person impairment. The range of motion measurements taken by Dr. Reichhardt were more restrictive than those found by Dr. Kalevik.

13. Dr. Elizabeth Bisgard performed a Claimant's IME. She was largely in agreement with Dr. Reichhardt's rating. She stated that the range of motion measurements she took were slightly diminished compared to Dr. Reichhardt's. She also thought that Dr. Reichhardt should have given an additional impairment for subacromial decompression but she considered this only a difference of opinion.

14. As part of the IME exam, Dr. Bisgard had Claimant fill out a questionnaire and pain diagram. The diagram shows pain in the front of the left shoulder between the shoulder joint and the neck, and also pain in the same location on the torso but in the back of the shoulder by the shoulder blade.

15. Dr. Kathy McCrainie performed a Respondent's IME. In her July 15, 2015 report she stated under "Impression" that Claimant has left shoulder pain. She did not state the location of the pain in relation to the shoulder. However, in her conclusions she stated that Claimant should not receive a whole person impairment because his

pain does not extend beyond his arm at the shoulder. She agreed with both Dr. Reichhardt and Dr. Kalevik's ratings and said they were correct based on the range of motion demonstrated during their respective exams. She assigned a rating of 5% of the upper extremity. However, when outlining Claimant's current symptomatology, she stated that Claimant reports pain across the front of the shoulder and muscle spasms across the shoulder blade.

16. Dr. McCrainie's report did not include a questionnaire or pain diagram filled out by Claimant.

17. Claimant testified that he still has discomfort in his shoulder as he pointed to the top of his shoulder, the front of this shoulder, and his shoulder blade. Claimant testified that he has no pain in his arm and that his pain is limited to his torso.

18. The ALJ finds that the impairment rating opinions given by Drs. Kalevik, Reichhardt, Bisgard, and McCrainie are merely differences of opinion and do not rise to a level that would show by clear and convincing evidence that Dr. Reichhardt was incorrect in his DIME opinion.

19. The medical records and Claimant's testimony clearly show Claimant having pain in the torso portion of his shoulder in an area between the glenohumeral joint and the neck as well as in the front and back of his shoulder in the torso area and shoulder blade.

20. The ALJ finds that Respondent has not proven by clear and convincing evidence that DIME Dr. Reichhardt erred in his impairment rating.

21. The ALJ finds that the whole person rating of 5% provided by Dr. Reichhardt as the DIME doctor is the appropriate rating of Claimant's impairment.

CONCLUSIONS OF LAW

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

Generally

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

Overcoming a Division IME

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

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Respondent contends that because each of the IME doctors recorded different active range of motion (AROM) numbers, the largest AROM must be used because lower numbers were the result of Claimant using suboptimal effort. The ALJ is not persuaded. First, no evidence was provided that Claimant used suboptimal effort in any exam or that any of the AROM numbers were invalid. Second, Respondent offers no law to support its theory and the ALJ likewise finds none.

In this case, differences in Claimant's ratings between Dr. Kalevik and Dr. Reichhardt do not show that either doctor necessarily erred in their examination and calculations. While Dr. Bisgard said she would have included a rating for the subacromial decompression, she also stated that it was simply a difference of opinion. Dr. McCrainie stated that both Dr. Kalevik and Dr. Reichhardt gave correct ratings based upon the ranges of motion shown during their respective exams. She gave a rating of 5% of the upper extremity which is between the ratings given by Dr. Kalevik and Dr. Reichhardt. There is no strong evidence that Dr. Reichhardt was incorrect in his rating and certainly nothing that would prove error by the requisite clear and convincing evidence required by §8-42-107 (8)(b)(III) C.R.S.

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." The credible evidence shows that Claimant's shoulder joint is impaired and that this impairment extends into the torso area between the top of Claimant's arm and his neck, both in the front and the back. This is consistent in the pain diagrams he filled out before he was placed at maximum medical improvement or given a rating. Dr. Reichardt also found pain in those areas and that Claimant's scapula was in spasm. The scapula is not part of the arm. None of the pain diagrams designate pain in Claimant's arm; and, indeed, Claimant testified that he has no pain in his arm but that his pain is limited to the torso in an area also considered to be part of the shoulder.

Based upon the situs of Claimant's impairment being in the torso, evidenced by the pain and symptoms being limited to that area, the ALJ concludes that Claimant should receive 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 5% whole person rating given the Dr. Reichardt in his DIME report.

2. Interest at the rate of 8% shall be paid on all compensatory benefits not paid when due.

3. 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: September 21, 2015

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that the proposed dental treatment is reasonable and necessary, as well as related to his injury?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant suffered a compensable industrial injury on June 20, 2014 while working for Respondent-Employer. Claimant was employed in a maintenance position and was trimming trees when injured. He lost his footing while on a ladder, which kicked out and caused him to fall to the ground. Claimant fell anywhere from twenty (20) to thirty (30) feet to the ground. He lost consciousness as a result of the fall.

2. Claimant was transported by ambulance to Denver Health where he was treated for multiple injuries. This included injuries to his left wrist, left hip and ankle. The EMS Patient Care Report noted that Claimant was missing his left front tooth and there was dried blood on his upper lip.

3. In the Denver Health Provider Initial Assessment record from June 20th, Dr. Holst recorded that Claimant was "missing L incisor, loose R incisor". Claimant was also examined by Dr. Sorensen (resident) and Dr. Pieracci (attending) at Denver Health, who documented blood in the area of Claimant's mouth on the Trauma History and Physical Consultation form.

4. In the Pre-Anesthetic Evaluation there was a reference to a loose tooth on the left side and a note which said "missing (lost tooth with fall)". A loose tooth was also noted on the right side. The number 1 was circled for both teeth and these notations appear to refer to Claimant's upper teeth. Claimant's dentition was described as "poor" and the doctor discussed the increased risk of dental damage with Claimant because of condition of his teeth. No other loose teeth were identified in this record.

5. Claimant underwent a surgical repair of his left wrist and left leg fractures at Denver Health. He was discharged after the surgery. He then began treating at Concentra, the ATP for Respondents.

6. Claimant was seen by Michael Noce, PA-C at Concentra on August 27, 2014. At that time, the assessment was subtrochanteric fracture of left femur, open fracture of left distal radius, left calcaneal fracture and tooth missing. He was given a dental referral for the missing tooth.

7. Claimant testified that he was unaware that he had preexisting bone loss, periodontal disease or decayed teeth. Claimant testified that prior to the accident, he was missing one tooth on his lower jaw. He stated that he did not have jaw pain or any loose teeth on the lower jaw prior to the fall.

8. An Employer's First Report of Injury (E-1) was filed on or about June 30, 2014.

9. A General Admission of Liability was filed on or about August 1, 2014, in which Respondents admitted for wage and medical benefits.

10. Claimant was examined by Amanda Jozsa, DDS at Edgewater Modern Dentistry on September 10, 2014. At that time, a full dental examination was performed and full mouth x-rays were taken. Claimant testified that a mold was taken of his upper teeth at this appointment. The treatment note specified: "Perio Eval: Inflammation moderate Calculus severe Prognosis poor Perio Type III candidate." No evidence was submitted to the ALJ concerning Dr. Jozsa's qualifications or experience.

11. Dr. Jozsa issued a letter (undated) in which she noted that Claimant had a fall at work which caused one front tooth (#9) to fall out and also caused twelve of his teeth (in the upper and lower arch) to become loose [Exhibit 7, p. 44]. Dr. Jozsa noted that this patient had advanced periodontal disease and his teeth had a poor prognosis. Dr. Jozsa stated that the accident caused Claimant's teeth to become mobile, which caused bacteria to attack the teeth and resulted in further deterioration. Recommended treatment was extraction of remaining teeth and implant retained dentures. Claimant testified that he was not provided with any other treatment options.

12. Additional records from Concentra (covering the period from 10/15/14 through 1/5/15) were submitted behalf of Claimant. The ALJ notes that these medical records concerned Claimant's injuries to the left wrist/ left leg (ankle and foot) and also documented the dental referral. However, these records did not address the issue of causation or Claimant's need for dental treatment.

13. A review of Claimant's medical and dental records (including x-rays) was conducted on behalf of Respondents by Joseph Tomlinson, DMD, who issued a report dated December 8, 2014. Dr. Tomlinson did not examine the Claimant. Dr. Tomlinson practiced dentistry and treated patients from 1973 to 2012. Dr. Tomlinson was qualified as an expert in dentistry and periodontal disease. Dr. Tomlinson testified that he worked for Nadent which is a national company that reviews dental trauma cases for insurance companies to determine whether treatment is necessary and related to the traumatic incident[1].

---

[1] Claimant argued that there was evidence of Dr. Tomlinson's bias in the reference in his CV which stated: "Of all the claims reviewed by Nadent consultants, about one-fourth are found to be either partially, or fully acceptable… For the remaining claims reviewed by Nadent consultants, a significant amount of the treatment submitted is determined to be for pre-existing conditions, not causally related to the accident in question." From Dr. Tomlinson's CV, it is clear that a majority of Dr. Tomlinson's work at

14. Dr. Tomlinson erroneously[2] stated in his report that no bleeding about the mouth area was noted in any of the medical records submitted to him. Dr. Tomlinson felt that the evaluation of Claimant which was done was missing several things, including periodontal probing and measurements of mobility; which he described as a normal part of an evaluation of someone with advanced periodontal disease. Dr. Tomlinson observed that the probing and measurement should be done for every tooth when this treatment was being considered. Dr. Tomlinson noted that Claimant waited nearly three months to visit a dentist.

15. Dr. Tomlinson testified that Claimant had a number of preexisting conditions in his mouth, including advanced bone loss in the upper and lower anterior teeth and several posterior teeth; that he was missing teeth numbers 20, 24 and 30 in the lower arch; and a chronic infection was present. He had advanced dental decay in tooth number 1. Dr. Tomlinson concluded that Claimant had advanced periodontal disease. This was shown in the dental x-rays, along with the photographs of Claimant's teeth. Dr. Tomlinson noted that a substantial amount of calculus (also called tartar) was present, which resulted in the bone loss and mobility of Claimant's teeth. The mobility in Claimant's teeth was present long before the accident and was associated with the bone loss. Dr. Tomlinson described the process where tartar pushed the gum tissue back, which caused infection and bone loss.

16. Dr. Tomlinson also opined that there was a lack of serious injury to the lower teeth, as evidenced by the medical records which referred to two loose teeth in the upper jaw.

17. Dr. Tomlinson concluded that it was highly probable that tooth #9 was missing prior to the accident. The contour of the bone at this site was evidence that tooth #9 was missing before the day of the incident in question.

18. Dr. Tomlinson testified that Claimant may have aggravated the prior condition of teeth #7 and #8, causing these to be more mobile than before. His report went on to say that tooth #7 and #8 "were loosened more than they were previously as a result of a traumatic impact, although the x-ray is more consistent with an impact that occurred just a few days before the x-ray images were taken on 9/1/14, not 80 days earlier". Bone loss around #7 and #8 was described as significant, with 70% occurring before the subject accident. Dr. Tomlinson opined that it was reasonable to extract those teeth.

Nadent was done on behalf of insurance carriers and the ALJ has considered this. However, the ALJ declines to draw the blanket inference that Dr. Tomlinson's opinions would only be favorable to insurance carriers and therefore all of his testimony was unreliable. Indeed, Dr. Tomlinson found that the treatment rendered to Claimant's upper jaw was reasonable and necessary, even though his periodontal disease was preexisting. The ALJ has considered Dr. Tomlinson's employment with Nadent, as well as his professional experience when determining what weight to give his opinions.

[2] Dr. Tomlinson testified at hearing and confirmed that this was an error in his report. Dr. Tomlinson also corrected another error in his report in the treatment section which he referred to tooth #19, which he corrected to tooth #20. [Exhibit A, p. 2]

19. Dr. Tomlinson concluded that the only treatment causally related to the subject accident was extraction of teeth #7 and #8 and only 50% of that treatment was related. He recommended a removable partial denture or six-tooth bridge, provided that nearby teeth #6 and #11 had healthy enough bone support.

20. Dr. Tomlinson opined that several teeth in the lower jaw had significant bone loss which required extraction. Dr. Tomlinson said tooth #1 required extraction because of decay; teeth #23-26 appeared to need extraction due to pre-existing bone loss caused by periodontal disease. However, Dr. Tomlinson believed that a number of the lower teeth could be retained. Dr. Tomlinson noted that teeth #20 and 30 were missing and along with #23-26 would benefit from a lower removable partial denture. Dr. Tomlinson stated that the treatment required by the lower jaw was completely unrelated to the incident. Dr. Tomlinson testified that prior to any further treatment, Claimant needed to be evaluated by a periodontist. The inference drawn from this expert testimony was that less expensive options were not fully considered by the treating dentist(s).

21. In March 2015, Respondents authorized the treatment proposed by Dr Jozsa at Edgewater Modern Dentistry for Claimant's upper teeth pursuant to the W.C.R.P. This was confirmed by adjuster Renessa Jensen on March 11, 2015 [Exhibit 7, page 43] and the ALJ concludes that the adjuster relied on Dr. Tomlinson's report when this treatment was authorized. Claimant confirmed that he had the dental surgery on his upper jaw in March, 2015, which included implants.

22. In the treatment notes from Edgewater Modern Dentistry, dated 3/27/15, the consulting dentist (Ryan Reyes) noted as the diagnosis: "gen severe chronic periodontitis, et: bact plaque: tx; all on 4 for max (mandible in the future)".

23. Claimant submitted a letter to his attorney of record from George Yash, operations manager (presumably from Edgewater Modern Dentistry), citing Dr. Jozsa's report. [Finding of Fact No. 11]. He stated that the proposed treatment of the insurance carrier in no way offered adequate care and stated Dr. Jozsa prognosis for a bridge was unacceptable. No information concerning Mr. Yash's qualifications was presented to the ALJ.

24. Medical records from Albert Hattem, M.D. were admitted at hearing. In his 4/3/15 report, Dr. Hattem referred to Claimant's dental trauma. The note said: status post denture fabrication currently being monitored by a dentist". Dr. Hattem did not have the dental records and made no conclusions with regard to this aspect of Claimant's injury.

25. Claimant testified that the upper portion of his mouth was doing well with the implants. He was requesting the proposed dental treatment. Claimant testified that he still has problems with his lower jaw and cannot eat hard foods due to the pressure on his teeth. Claimant said that his lower teeth have jagged edges and he feels pressure on the jaw, which causes pain.

26. The Claimant failed to prove it is more probably true than not that the fall caused the underlying periodontal disease in his lower jaw to become symptomatic to the point that it required treatment. The ALJ finds that the fall caused an injury to Claimant's upper jaw, which required treatment.

27. The ALJ credits the opinion of Dr. Tomlinson, who noted that Claimant's lower molar teeth (#20 and #30) were missing prior to the accident and, along with teeth #23-26, Dr. Tomlinson felt these teeth would benefit from by being replaced with a lower removable denture. Significantly, Dr. Tomlinson opined this was unrelated to the accident. Claimant's testimony that he was missing one tooth prior to the fall establishes that there were issues in the lower jaw prior to his industrial injury. In fact, there is evidence that he was missing other teeth in the lower jaw prior to June 20, 2014. Furthermore, there was no reference in the Denver Health records that teeth numbers 20 and 30 were lost as a result of the fall. The ALJ finds that the evidence supports the conclusion that the loss of these teeth was the result of Claimant's periodontal disease.

28. The ALJ also credits the explanation of periodontal disease provided by Dr. Tomlinson at hearing. Dr. Tomlinson explained the progression of periodontal disease and how it was the primary reason Claimant required treatment for teeth in the lower jaw. Thus, Claimant's need for on his lower jaw was the result of preexisting periodontal disease, not the industrial injury.

29. The ALJ is not persuaded by the opinion of Dr. Jozsa concerning treatment to the lower jaw. Dr. Jozsa's explanation that the fall loosened multiple teeth in the lower jaw was not supported by the Denver Health medical records. Dr. Jozsa's opinion also did not address the possibility that Claimant's teeth on the lower jaw became mobile as a result of the natural progression of the preexisting periodontal disease, irrespective of the subject fall. Further, Dr. Jozsa's conclusion that the trauma to the lower jaw caused bacteria to attack the teeth and led to further deterioration was rebutted by Dr. Tomlinson.

30. Evidence and inferences inconsistent with these findings are not credible and persuasive. Because the Claimant failed to prove a causal nexus between the injury and the requested treatment, the ALJ need not address the other issues raised by the parties with respect to this claim.

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).

Medical (Dental) 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). The question in the case at bench has three parts; first, what was the scope of Claimant's injury to his mouth. Second, to what degree was the need for the proposed dental treatment causally related to the admitted industrial injury, as opposed to the pre-existing periodontal disease. Third, was the proposed treatment reasonable and necessary.

Claimant contended first that his need for dental treatment, including tooth extraction and implants, was caused by his injury. Claimant alleged that he injured his mouth in the 6/20/14 admitted industrial injury, which aggravated and/or accelerated his pre-existing periodontal disease. In this regard, he relied on the opinions of the treating dentists at Edgewater Modern Dentistry (Dr. Josza in particular). Second, he averred

that the proposed dental treatment was reasonable and necessary to cure the effects of his injury.

As a starting point, the ambulance records and medical records from Denver Health admitted at hearing established that Claimant suffered trauma to his mouth as a direct result of the work injury. This was a significant fall from height that injured the Claimant as documented by the Denver Health records. Specifically, the 6/20/14 records described "poor dentition, missing lost tooth after the fall on the left and loose right tooth". There was also the presence of blood in the area of Claimant's mouth which was further evidence of trauma. (Two references to blood in the mouth area are found in the Denver Health records.) The ALJ notes that the trauma appeared to be localized in the upper jaw, where the loose teeth were found. This was confirmed by the records for Denver Health.

Respondents did not dispute these facts and a logical inference derived from the evidence is that a fall from 20 to 30 feet in the air could have caused those injuries to Claimant's mouth. Put another way, the ALJ concludes that Claimant suffered an injury to his mouth in this case. Thus, there is no question that Respondents are liable to the extent that the industrial injury aggravated or accelerated his dental condition and led to the need for dental treatment in this case.

In this regard, while the ALJ concluded that Claimant's fall caused an injury to his mouth, the next question is whether he suffered an injury to the teeth in his lower jaw necessitating the treatment at issue here. The records submitted at hearing do not establish that Claimant lost teeth in his lower jaw as a result of the fall, nor was there evidence of loose teeth in the immediate aftermath. The Denver Health records do not document multiple loose teeth in the lower jaw. In fact, these records document loose teeth in the upper jaw. Dr. Tomlinson also opined that there was no treatment to the teeth in the lower jaw in the acute phase of Claimant's injury, which also tends to corroborate this fact. On the other hand, Claimant testified that his teeth were loose after he fell. In addition, Dr. Jozsa opined that the fall loosened the teeth, which allowed bacteria to damage the teeth in the lower jaw further.

Thus, there is a *bona fide* dispute as to whether the fall caused the teeth in the lower jaw to be loose. After considering all of the evidence, the ALJ is unable to conclude that the fall caused multiple teeth on the lower jaw to become loose. The ALJ is also unable to conclude that the fall caused the mobility in these teeth, as opposed to the periodontal disease. Claimant has the burden of proof on this issue and has failed to establish by a preponderance of the evidence that the fall injured his teeth in the lower jaw, as opposed to the periodontal disease. Where Claimant has not met his burden, the claim for medical (dental) benefits fails. As noted *infra,* the ALJ also concludes that Claimant has failed to meet his burden of proof on causation.

Causation

The inquiry then turns to the issue of what treatment Claimant requires as a result of the admitted injury, as opposed to the preexisting periodontal disease. This is the overarching issue in the case and the ALJ considered the competing opinions of the dental experts. Expert opinion is neither necessary nor conclusive on the issue of causation. However, where expert opinions are presented it is for the ALJ to assess their weight and credibility. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). The question of whether the Claimant has proven causation is one of fact for resolution by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 1999).

Dr. Tomlinson identified Claimant's pre-existing periodontal disease, which caused substantial bone loss as the primary reason for his need for treatment. Dr. Tomlinson noted that there was substantial calculus build-up, which caused Claimant's gums to recede. This in turn led to infection and bone loss, which caused Mr. Sullivan's teeth to be mobile. The ALJ finds this opinion to be more persuasive than Dr. Jozsa's. In his testimony, Dr. Tomlinson referred specifically to the photographs of Claimant's teeth, providing a detailed explanation of how periodontal disease progressed to the Court. He also referred to the x-rays when offering his opinion that the need for dental treatment on the lower jaw was not related to the fall. Rather, Dr. Tomlinson felt that this was due to preexisting bone loss and advanced periodontal disease.

On the other hand, Dr. Jozsa provided only a conclusory opinion and while she referred to the preexisting periodontal disease, her explanation was that the fall caused the teeth to become mobile, which in turn led to bacteria attacking the teeth. The ALJ did not find this opinion to be credible, particularly where there was evidence of infection directly resulting from the periodontal disease. Dr. Jozsa also did not address which teeth were missing before the accident. From the photographs, as well as in x-rays of Claimant's teeth, it is clear that there was a significant amount of tartar (calculus) around the teeth, which was not noted by Dr. Jozsa. Dr. Jozsa's records did not refer to the x-rays/photographs, nor did she address the preexisting disease in any detail. Dr. Jozsa did not address the cause of the bone loss in the lower jaw or provide information any opinion on apportionment.

On the other hand, Dr. Tomlinson's report and testimony addressed all of these issues. Based upon the evidence, the ALJ draws the logical inference that Claimant's poor dentition caused bacteria to be present and bone loss to occur; all of which occurred prior to the fall. Claimant's need for treatment, therefore, came from the preexisting periodontal disease, not his fall.

In addition, Dr. Tomlinson also offered the opinion that Claimant had several teeth on the lower jaw which did not require extraction. Dr. Tomlinson proffered a removable partial denture as an alternative treatment. In response, Claimant submitted a letter from Edgewater Modern Dentistry, authored by the office manager whose qualifications were unknown and simply cited Dr. Jozsa's prior report to conclude that removable denture was unreasonable. Without further explanation, the Dr. Josza's

report is insufficient to prove that Claimant's need for treatment on his lower jaw was a result of the injuries sustained in the fall.

As determined in Findings of Fact Numbers 15 through 20 and 27 through 29, the Claimant failed to prove it is more probably true than not that the fall on June 20, 2014 caused the condition in his lower jaw, which required the proposed dental treatment. There was no dispute that Claimant's dentition was poor, which caused deterioration in both his upper and lower jaw. He had significant periodontal disease prior to this accident. This was documented in the Denver Health records. The ALJ concludes that this preexisting condition was the substantial factor in Claimant's need for treatment. Dr. Tomlinson's testimony was directly on point and confirmed that Claimant's periodontal disease was primary factor in his need for treatment. In this regard, Dr. Tomlinson identified the extensive tartar around Claimant's teeth as the cause of bacteria and the migration of the teeth, which the ALJ finds persuasive. Even though there were errors in Dr. Tomlinson's report which somewhat impacted his credibility, his explanation as to the course of Claimant's periodontal disease was credible. This contrasted with the treating dentist, Dr. Jozsa, whose opinion did not establish a causal connection between the industrial injury and proposed dental treatment. Accordingly, the ALJ finds that Claimant's need for implant retained dentures was not caused by the subject accident.

Because the ALJ has determined that the industrial injury did not cause Claimant's need for treatment, the issue of whether Dr. Jozsa/Edgewater Modern Dentistry's proposed treatment was reasonable and necessary is not reached.

ORDER

It is therefore ordered that:

1. Claimant's request for dental treatment to his lower jaw 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: September 21, 2015

_____

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of a work-related injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 23, 2014 until terminated by statute.

5. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant is a 46 year old male. During the summer of 2013 Claimant lived in San Diego, California with his wife and daughter. He was unemployed and sent a number of resumes to companies in Colorado seeking work in financing in the automobile industry. He sent one of the resumes to Employer but did not initially obtain a position.

2. On October 17, 2013 Claimant was hired to work as a Branch Manager for JD Byrider in Denver, Colorado at a salary of $47,000 per year. Claimant moved to Denver to live with his mother while his wife and daughter remained in San Diego. Claimant also followed-up with Employer about a job opportunity.

3. Employer is a corporation that includes an automobile dealership and an automobile finance company. Employer is located in Colorado Springs, Colorado. Mike Bonicelli is the owner of Employer.

4. In late October 2013 Mr. Bonicelli determined that the General Manager of the finance company was not working out. He contacted Claimant about the position. Mr. Bonicelli and his wife Sharon Bonicelli subsequently had lunch with Claimant and his mother. Following the lunch meeting Mr. Bonicelli offered Claimant the position of

General Manager of Employer's finance company. Claimant accepted the position and was scheduled to begin work on November 18, 2013.

5. On November 18, 2013 Claimant reported to work for Employer and completed paperwork. The paperwork reflected that Claimant would earn a salary of $45,000 per year but did not include any benefits. Claimant then began work for Employer. On the following day Claimant resigned his position with J.D. Byrider.

6. Claimant moved from Denver to Colorado Springs to be closer to his place of employment. He told Ms. Bonicelli that his wife was very unhappy because he had not found a place to live in Colorado Springs. Claimant's wife refused to move from San Diego to Colorado Springs to live in a motel.

7. Ms. Bonicelli personally owned a home in the Broadmoor area of Colorado Springs that was unoccupied and for dale. The home was 4,000 square feet, had five bedrooms and was located in an excellent school district. Ms. Bonicelli told Claimant that she had previously rented the house at a reduced rate in exchange for the renter acting as a caretaker of the home. The previous renter had no affiliation with Employer. The renter furnished the house, kept it in staged condition for showings and maintained the house. In early December 2013 Ms. Bonicelli offered Claimant the same arrangement. Ms. Bonicelli's offer of rental housing at a reduced rate was neither an employment inducement nor benefit.

8. On December 17, 2013 Claimant and Ms. Bonicelli executed a Residential Lease Agreement for the Broadmoor house. The terms of the lease reflected a month-to-month tenancy and written termination of the lease by either party 10 days before the end of a monthly period. The Agreement also provided that Claimant would maintain the house in a staged condition devoid of clutter for showings.

9. By the third week of January 2014 Claimant had not moved his furniture from San Diego to Colorado Springs in order to properly stage the property for showings. Claimant, his wife and his daughter were living on boxes and sleeping on air mattresses. Claimant approached Mr. Bonicelli stating that his wife was going to leave him if he did not do something about the furniture. Mr. Bonicelli loaned Claimant $4,000 to move the furniture to Colorado.

10. On February 25, 2014 Ms. Bonicelli's realtor notified her stating that Claimant had declined a house showing. It was not the only showing that Claimant had refused. The Bonicelli's subsequently scheduled a time to inspect the Broadmoor house and examine the furniture. The inspection went poorly. There was a paucity of furniture in the house and the property was not in staged condition. The refrigerator was dirty, there were dog feces on the basement carpet and Claimant's daughter's room was completely unfurnished.

11. Based on the inspection Ms. Bonicelli concluded that Claimant was not complying with the Lease Agreement and decided to terminate the Agreement. On February 28, 2014 Ms. Bonicelli signed a Notice of Termination of Lease. Mr. Bonicelli

delivered the document to Claimant on March 1, 2014 at work. Because Claimant was on the telephone Mr. Bonicelli left the Lease Termination document on his desk. The lease was to terminate effective March 31, 2015.

12. During March 2014 Claimant told Mr. Bonicelli that he was not earning enough money. Mr. Bonicelli subsequently scheduled a performance review and offered Claimant a $3,000 raise to $48,000 annually. Claimant declined the offer. On March 31, 2014 Claimant e-mailed Mr. Bonicelli seeking a $15,000 raise to $60,000 per year plus a $4,000 bonus. Mr. Bonicelli informed Claimant that he could not meet the request.

13. Based upon Claimant's reaction to the salary dispute, Mr. Bonicelli believed Claimant was quitting his job and had an assistant prepare exit paperwork. On March 31, 2014 Mr. Bonicelli drove to Employer's finance office to have Claimant complete the paperwork. Claimant responded that he was not quitting and would not move out of Ms. Bonicelli's Broadmoor house. Mr. Bonicelli told Claimant to leave work for the day and return on the following day with a decision about how he would proceed.

14. On April 1, 2014 Claimant contacted Mr. Bonicelli and told him he was not going to return to work until the compensation situation was resolved. Later in the morning Claimant met with Mr. Bonicelli and Office Manager Chrystal Farr in a conference room at Employer's automobile dealership. Claimant and Mr. Bonicelli negotiated regarding compensation. Claimant reiterated that he was worth his salary demands and Mr. Bonicelli maintained that Employer could not meet his demands. Because the negotiations failed Claimant asked to be fired, but Mr. Bonicelli declined and told Claimant to return to work. Claimant responded that there was a hostile work environment, refused to work until he consulted a lawyer and left the premises.

15. Mr. Bonicelli consulted his attorney about Claimant's employment situation. The attorney recommended terminating Claimant. Mr. Bonicelli then drove to Employer's finance company to apprise Acting Manager Heidi Bissitt about Claimant's employment. Shortly after Mr. Bonicelli arrived Claimant reached the facility. Mr. Bonicelli then terminated Claimant's employment.

16. On April 4, 2015 Claimant applied for a new position with Lobel Financial. Approximately one week later Claimant experienced recurrent appendicitis symptoms and visited an emergency room. Claimant was hospitalized and underwent several surgical procedures. He underwent a GI procedure for chronic diarrhea and chronic diffuse abdominal pain, a colonoscopy and an appendectomy. The record reveals that before Claimant's hospitalization he suffered a number of mental and physical conditions prior to and during his employment with Employer. He suffered significant back pain, anxiety, chronic abdominal issues and excruciating headaches. Claimant received multiple medications for his conditions.

17. On April 17, 2014 Claimant was hired by Lobel and began working in the Denver office. However, Lobel soon granted Claimant's transfer request to its Seattle,

Washington location. The transfer became effective on May 12, 2014. In the meantime, Claimant continued to work in Lobel's Denver office.

18. On May 10, 2014 Claimant flew to Washington to begin working in Lobel's Seattle office. On May 11, 2014 Claimant visited the emergency department at St. Francis Hospital in Seattle for recurrent abdominal issues, nausea and diarrhea. Claimant returned to work at Lobel on May 12, 2014, but he left at 10:00 a.m. to return to the hospital. He was ultimately hospitalized between May 12, 2014 and May 22, 2014. While hospitalized, Claimant tested positive for a C-Diff infection. Although Claimant was discharged from the hospital on May 22, 2014, he was subsequently hospitalized at Oregon Health Sciences University (OHSU) in Portland, Oregon.

19. On May 30, 2014 Claimant lost his job with Lobel because of his prolonged absence from work as a result of his hospitalizations. Claimant negotiated a settlement agreement with Lobel as part of his employment separation.

20. After his termination from Lobel Claimant returned to Colorado. On July 2, 2014 Claimant began treatment at the Arapahoe/Douglas Mental Health Network. He primarily received care and treatment from Judith Olin, LCSW and Clinical Psychiatrist Ergi Gumusaneli, M.D.

21. On July 8, 2014 Claimant filed a Claim for Workers' Compensation. He asserted that he suffered mental stress because Employer reneged on the employment agreement. He suffered physical trauma resulting in four hospitalizations in two months.

22. Claimant initially visited Dr. Gumusaneli on July 17, 2014. Dr. Gumusaneli noted that Claimant presented with many depressive, anxiety and OCD symptoms that began after he was terminated from employment with Employer around March 2014. Claimant explained that he moved his family from San Diego to Colorado because of a "great offer" that included housing. Although his employment in Colorado Springs initially went well, he was subsequently evicted and terminated from employment. Dr. Gumusaneli remarked that Claimant suffered a number of mental and physical issues that produced numerous hospitalizations and surgery. Dr. Gumusaneli explained that Claimant initially may have suffered from an adjustment disorder from the loss of his job but developed major depressive symptoms, anxiety and OCD. He was uncertain whether Claimant truly struggled with OCD or whether his symptoms were related to his numerous losses. Dr. Gumusaneli suspected that treatment would be considered successful when Claimant could again provide for his family. Claimant subsequently received follow-up counseling and medications from Dr. Gumusaneli through July and August 2014.

23. On September 18, 2014 Claimant underwent an independent psychiatric evaluation with Psychiatrist Stephen A. Moe, M.D. Claimant reported to Dr. Moe that Mr. Bonicelli created a tense working environment by berating and criticizing employees. He also explained the he had been misled about the nature of his rental agreement for the Broadmoor house. Claimant remarked that, when he accepted his

job with Employer, he understood that he and his family could occupy the property for at least one year. When Mr. Bonicelli terminated the lease by dropping off an envelope on his work desk on a Saturday morning, Claimant felt betrayed and emotionally distressed. Claimant also recounted the circumstances surrounding his termination from employment and subsequent eviction from the Broadmoor house. He commented that he soon obtained a position with Lobel earning $15,000 more in annual salary than he had with Employer. However, he developed a myriad of physical and psychological problems that he attributed to Mr. Bonicelli's actions and his work for Employer.

24. Considering §8-41-301(2)(a), C.R.S., Dr. Moe evaluated the cause of Claimant's physical and psychological symptoms. He considered the following four potential causes of Claimant's psychiatric symptoms and impairment: (1) verbal abuse/bullying by Mr. Bonicelli; (2) reneging of promises by Mr. Bonicelli; (3) Claimant's termination from employment and (4) the impact of physical symptoms caused by work-related stress. Dr. Moe disagreed that Claimant's emotional stress during his employment with Employer was primarily caused by his job demands. He thus concluded that it was highly doubtful that Claimant met the legal criteria for a work-related mental stress claim.

25. On December 8, 2014 Dr. Moe issued a supplemental report. He reviewed additional medical and employment records. Dr. Moe maintained that Claimant failed to satisfy the criteria to establish a mental stress claim pursuant to §8-41-301(2)(a), C.R.S.

26. Claimant testified at the hearing in this matter. He explained that his agreement with Employer included a $45,000 per year salary and the reduced monthly rent of $700.00 on the Broadmoor house. Claimant stated that he would not have accepted the position with Employer if the discounted rent had not been part of the employment agreement. He associated his mental stress claim with the termination of his lease agreement on the Broadmoor property. Claimant recounted a myriad of physical and psychological conditions that occurred after the lease was terminated and his subsequent dismissal from employment

27. Dr. Gumusaneli testified at the hearing in this matter. He stated that he is a clinical psychiatrist who saw Claimant on five occasions between July 2014 and August 2014. He diagnosed Claimant with depression and anxiety. The conditions were caused by Claimant's loss of the Broadmoor house and termination of his job with Employer. However, Dr. Gumusaneli admitted he is not familiar with the mental stress statute and lacks training on how to perform causation evaluations. He acknowledged that he was unaware of any of the other stressors that impacted Claimant. Dr. Gumusaneli also noted that he did not know whether Claimant suffered any psychologically traumatic event generally outside a worker's usual experience and admitted that losing a job is an event common to all fields of employment.

28. On July 22, 2015 Dr. Moe testified through an evidentiary deposition in this matter. He reiterated that Claimant failed to meet the legal criteria for a work-related mental stress claim. Dr. Moe explained that in order to demonstrate a

compensable mental stress claim pursuant to §8-41-301(2)(a), C.R.S. a claimant must establish the following: (1) he experienced significant mental stress at work; (2) it was the type of mental stress that qualifies for a claim; (3) the stress gave rise to symptoms in the first place; and (4) the significant symptoms were largely due to the work stress. Dr. Moe maintained that Claimant's mental stress claim failed when considered under the preceding criteria. Moreover, he noted that there was an attenuated temporal relationship between Claimant's traumatic events and the necessity of psychiatric impairment. Claimant had physical and emotional symptoms before he began working for Employer, physical and emotional symptoms before the notice of eviction and physical and emotional issues before his employment termination.

29. Dr. Moe determined that a loss of employment benefits and a termination from employment are events common to all fields of employment. They are specifically excluded as mental stress claims pursuant to §8-41-301(2)(a), C.R.S. Furthermore, Dr. Moe remarked that neither the lease termination nor the employment termination appeared to be done in bad faith.

30. Claimant has failed to establish that it is more probably true than not that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. However, Claimant's mental stress claim fails for numerous reasons including that the lease arrangement was not part of the employment agreement, his contentions are specifically excluded as bases for mental stress claims pursuant to statute and the persuasive testimony of Dr. Moe.

31. The record reveals that Claimant's reduced rental rate of the Broadmoor property did not constitute a work-related benefit. Claimant explained that his agreement with Employer included a $45,000 per year salary and reduced monthly rent of $700.00 on the Broadmoor house. Claimant stated that he would not have accepted the position with Employer if the discounted rent had not been part of the employment agreement. However, Ms. Bonicelli credibly explained that she had previously rented the house at a reduced rate in exchange for the renter also acting as a caretaker of the home. The previous renter had no affiliation with Employer. The renter furnished the house, kept it in staged condition for showings and maintained the house. In early December 2013 Ms. Bonicelli offered Claimant the same arrangement. On December 17, 2013 Claimant and Ms. Bonicelli executed a Residential Lease Agreement for the Broadmoor house. The terms of the Agreement reflected a month-to-month tenancy and written termination of the lease by either party 10 days before the end of a monthly period. The Agreement also provided that Claimant would maintain the house in a staged condition with no clutter for showings. The circumstances and timing of the lease arrangement reveal that the reduced rental rate was neither an inducement nor benefit of Claimant's employment agreement with Employer.

32. The mental stress statute specifically provides that a mental impairment shall not be considered to arise out of and in the course of employment if it is based on "a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion,

termination, retirement, or similar action taken in good faith by the employer." Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. Even if Claimant's reduced rent was part of the employment agreement with Employer, his contentions are common to all fields of employment and similar to the enumerated statutory preclusions for a mental stress claim. Because Claimant's bases for his mental stress claim are precluded by statute, his assertion fails.

33. Dr. Moe's persuasive testimony demonstrates that Claimant has failed to establish a mental stress claim. Initially, Dr. Gumusaneli diagnosed Claimant with depression and anxiety. He explained that the preceding conditions were caused by Claimant's loss of the Broadmoor house and termination of his job with Employer. However, Dr. Gumusaneli admitted he is not familiar with the mental stress statute and lacks training on how to perform causation evaluations. He acknowledged that he was unaware of any of the other stressors that impacted Claimant. Dr. Gumusaneli also noted that he did not know if Claimant had any psychologically traumatic event generally outside a worker's usual experience and admitted that losing a job is an event common to all fields of employment. In contrast, Dr. Moe persuasively concluded that Claimant failed to meet the legal criteria for a work-related mental stress claim. Dr. Moe explained that in order to demonstrate a compensable mental stress claim pursuant to §8-41-301(2)(a), C.R.S. a claimant must establish the following: (1) he experienced significant mental stress at work; (2) it was the type of mental stress that qualifies for a claim; (3) the stress gave rise to symptoms in the first place; and (4) the significant symptoms were largely due to the work stress. Dr. Moe maintained that Claimant's mental stress claim failed when considered under the preceding criteria. Moreover, he noted that there was not a good temporal relation between Claimant's traumatic events and the development of psychiatric impairment. Claimant had physical and emotional symptoms before he began working for Employer, physical and emotional symptoms before the notice of eviction and physical and emotional issues before his employment termination. Finally, a loss of employment benefits and a termination from employment are events common to all fields of employment. They are specifically excluded as mental stress claims pursuant to statute. Dr. Moe remarked that neither the lease termination nor the employment termination appeared to be done in bad faith. Based on the determination that the reduced rent for the Broadmoor house was not part of the employment agreement, the specific statutory exclusions of Claimant's contentions as the bases for a mental stress claim and the persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a General Manager 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. 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. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical

symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

6. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. However, Claimant's mental stress claim fails for numerous reasons including that the lease arrangement was not part of the employment agreement, his contentions are specifically excluded as bases for mental stress claims pursuant to statute and the persuasive testimony of Dr. Moe.

8. As found, the record reveals that Claimant's reduced rental rate of the Broadmoor property did not constitute a work-related benefit. Claimant explained that his agreement with Employer included a $45,000 per year salary and reduced monthly rent of $700.00 on the Broadmoor house. Claimant stated that he would not have accepted the position with Employer if the discounted rent had not been part of the employment agreement. However, Ms. Bonicelli credibly explained that she had

previously rented the house at a reduced rate in exchange for the renter also acting as a caretaker of the home. The previous renter had no affiliation with Employer. The renter furnished the house, kept it in staged condition for showings and maintained the house. In early December 2013 Ms. Bonicelli offered Claimant the same arrangement. On December 17, 2013 Claimant and Ms. Bonicelli executed a Residential Lease Agreement for the Broadmoor house. The terms of the Agreement reflected a month-to-month tenancy and written termination of the lease by either party 10 days before the end of a monthly period. The Agreement also provided that Claimant would maintain the house in a staged condition with no clutter for showings. The circumstances and timing of the lease arrangement reveal that the reduced rental rate was neither an inducement nor benefit of Claimant's employment agreement with Employer.

9. As found, the mental stress statute specifically provides that a mental impairment shall not be considered to arise out of and in the course of employment if it is based on "a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer." Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. Even if Claimant's reduced rent was part of the employment agreement with Employer, his contentions are common to all fields of employment and similar to the enumerated statutory preclusions for a mental stress claim. Because Claimant's bases for his mental stress claim are precluded by statute, his assertion fails.

10. As found, Dr. Moe's persuasive testimony demonstrates that Claimant has failed to establish a mental stress claim. Initially, Dr. Gumusaneli diagnosed Claimant with depression and anxiety. He explained that the preceding conditions were caused by Claimant's loss of the Broadmoor house and termination of his job with Employer. However, Dr. Gumusaneli admitted he is not familiar with the mental stress statute and lacks training on how to perform causation evaluations. He acknowledged that he was unaware of any of the other stressors that impacted Claimant. Dr. Gumusaneli also noted that he did not know if Claimant had any psychologically traumatic event generally outside a worker's usual experience and admitted that losing a job is an event common to all fields of employment. In contrast, Dr. Moe persuasively concluded that Claimant failed to meet the legal criteria for a work-related mental stress claim. Dr. Moe explained that in order to demonstrate a compensable mental stress claim pursuant to §8-41-301(2)(a), C.R.S. a claimant must establish the following: (1) he experienced significant mental stress at work; (2) it was the type of mental stress that qualifies for a claim; (3) the stress gave rise to symptoms in the first place; and (4) the significant symptoms were largely due to the work stress. Dr. Moe maintained that Claimant's mental stress claim failed when considered under the preceding criteria. Moreover, he noted that there was not a good temporal relation between Claimant's traumatic events and the development of psychiatric impairment. Claimant had physical and emotional symptoms before he began working for Employer, physical and emotional symptoms before the notice of eviction and physical and emotional issues before his employment termination. Finally, a loss of employment benefits and a termination from employment are events common to all fields of employment. They are specifically excluded as

mental stress claims pursuant to statute. Dr. Moe remarked that neither the lease termination nor the employment termination appeared to be done in bad faith. Based on the determination that the reduced rent for the Broadmoor house was not part of the employment agreement, the specific statutory exclusions of Claimant's contentions as the bases for a mental stress claim and the persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a General Manager for Employer.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

DATED: September 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issues for determination are:

1. Maximum medical improvement;

2. Medical benefits;

3. Average weekly wage;

4. TPD and TTD benefits;

5. Whether the right of selection of the treating physician has passed to the claimant; and,

6. Change of physician.

FINDINGS OF FACT

1. The claimant is a 40 year old food preparation worker who injured her right knee while working at the respondent-employer's restaurant on August 9, 2014. The claimant reported the injury to a Kitchen Manager named Casey on the day it happened. The respondent-employer took no action at that time. The claimant was off work the next several days. When she returned to work on August 13, 2014 she reported the injury to a Store Manager named Amber. Amber filled out a report and gave the claimant a list of medical providers. Premier Urgent Care was already circled.

2. A co-worker, Heather, drove the claimant to Premier Urgent Care. It was closed. They returned to the restaurant. Management instructed the co-worker to take the claimant to Penrose Hospital. The claimant presented to the emergency room at Penrose Hospital at approximately 10:00 p.m. She was diagnosed with "right knee sprain versus contusion," and was taken off work for two days.

3. The claimant presented to Anjmun Sharma, M.D., at Premier Urgent Care on August 14, 2014. Dr. Sharma diagnosed "right knee internal derangement." He prescribed a hinged knee brace, Percocet, physical therapy, and an MRI. He imposed work restrictions, and took the claimant off work August 15 to August 17, 2014. He released her to return to work with restrictions from August 18-22.

4. The claimant underwent a MRI of her right knee on August 19, 2014. It revealed mild patellofemoral joint effusion, with "small area of focal nodular synovitis in the ventral aspect of the anterior horn of the lateral meniscus extending into the intercondylar notch anteriorly. Associated degenerative changes with intrasubstance heterogeneous increased T2 signal involving the anterior horn of the lateral meniscus without evidence of tear."

5. On August 22, 2014, Dr. Sharma reviewed the MRI results. He diagnosed right knee sprain and right knee contusion. Dr. Sharma took the claimant off work from August 22 to August 24, 2014, and released to return to work with restrictions August 25 to September 10.

6. The claimant began physical therapy at Northgate Physical Therapy ("Northgate") on August 22, 2014. Therapist Ben Saunders noted, "…She states she heard a pop when she hit her knee and continues to have popping in the knee." Mr. Saunders noted the MRI revealed "focal nodular synovitis lateral meniscus."

7. As part of her physical therapy, the claimant was instructed to ambulate up and down stairs without assistive devices. While doing so at Northgate in September, 2014, the claimant experienced sudden pain and what she testified felt like an "explosion" in her right knee.

8. On September 10, 2014, Dr. Sharma recommended an orthopedic evaluation, and continued work restrictions September 10-15.

9. Orthopedist David Walden, M.D., saw the claimant on September 11, 2014. Dr. Walden noted the claimant tried physical therapy, "…which only made the situation worse." He reviewed the MRI and noted, "…It shows some minor changes in the anterior horn of the lateral meniscus as well as the associated notch." Dr. Walden noted the claimant's knee was hypersensitive and she had "fairly diffuse pain." He indicated that; "...Although not classic for reflex sympathetic dystrophy, there may be some elements of sympathetically mediated pain and I would recommend referral to a pain specialist with consideration for neurotrophic agents or sympathetic blocks…For now, physical therapy would probably make her situation worse…"

10. Dr. Sharma saw the claimant on September 15, 2014. He did not refer to her to a pain specialist, as Dr. Walden recommended. He prescribed Neurontin and noted "can resume gentle PT" despite Dr. Walden's opinion that physical therapy would probably make the situation worse. He continued work restrictions through October 6, 2014.

11. On October 10, 2014, Dr. Sharma continued work restrictions to November 5, 2014.

12. The claimant began seeing a new therapist, Fawn Lewis, at Northgate on October 15, 2014. Ms. Lewis noted she was "unable to assess meniscus." On October 17, 2014, Ms. Lewis noted, "…She states her knee pain is worse than when she had an MRI completed on 8/20/14." On October 21, 2014, Ms. Lewis noted, "Patient states: a lot of pain, c/o popping in front of knee." On October 23, 2014, Ms. Lewis noted, "Patient states: cont'd c/o pain in front and back of knee." On October 28, 2014, Ms. Lewis noted, "Patient states: pain increased yesterday, no known cause. Pain on side of patella, which hurts to touch or brush pants leg across it." On November 5, 2014, Ms. Lewis noted, "Chief complaints of pain below knee and lateral and posterior knee, preventing her from walking normally and doing her normal job duties. Stairs significantly increases pain and she c/o frequent popping in her patella…"

13. On November 5, 2014, Dr. Sharma diagnosed right patellar tracking, and right quadriceps atrophy. He continued the claimant's work restrictions.

14. On December 1, 2014 Dr. Sharma inexplicitly indicated the claimant reached MMI with no restrictions, no impairment, and no need for treatment after MMI.

15. Also inexplicitly on December 1, 2014, Dr. Sharma reported the claimant was *not* at MMI. He reported the claimant's right knee pain was "not improved." He referred the claimant back to Dr. Walden, and ordered a repeat MRI. He noted, "MMI if above are negative. F/u on 12/17/14." He maintained her temporary work restrictions.

16. When the claimant attempted to return to Dr. Sharma on December 17, 2014 he refused to see her. The claimant then presented to the emergency room at Penrose Hospital because she needed medical treatment. The emergency room physician diagnosed "right knee pain" and recommended the claimant "Continue to ice the knee, take Ibuprofen or Aleve, and follow up with an orthopedic surgeon for further evaluation and treatment." The claimant was referred to orthopedic surgeon Paul Rahill, M.D.

17. The claimant credibly testified she contacted Dr. Rahill's office by telephone and was asked whether she preferred to see a Spanish or English speaking doctor. She indicated Spanish. She was told she would see Dr. Miguel Castrejon.

18. Dr. Castrejon examined the claimant on December 18, 2014. He noted that, "…In mid September she was participating in physical therapy. She was going up and down stairs as part of her exercise program. As she performed this activity she

states that she had a sudden 'explosive' sensation within her knee that was followed by severe pain that has persisted. Prior to this event she states that she was improving." Dr. Castrejon noted the claimant, "…is reporting moderate to severe knee pain with sensation of swelling, weakness, limping and episodes of giving way. There is popping within the knee." Under "objective findings," Dr. Castrejon noted,"…Unable to heel and toe walk. Antalgic gait. Trace effusion. Quad 4/5 with atrophy. Tender with patellar compression and at lateral joint line. There is a popping sensation to her knee that is intermittently reproducible with McMurray. No instability." Dr. Castrejon diagnosed "right knee contusion/strain with reinjury in September 2014 rule out internal derangement."

19. Dr. Castrejon reviewed the claimant's MRI and noted, "…The study is not normal. There are degenerative changes within the lateral meniscus with synovitis and patellofemoral joint effusion. When seen by Dr. Sharma on 11/5/14 he documented right knee patellar tracking and quadriceps atrophy…"

20. Dr. Castrejon addressed the conflicting reports issued by Dr. Sharma; "…When seen on 12/1/14 he completed two WC164 forms. One form documents the claimant at MMI with diagnosis of right knee pain status post sprain with no restrictions and no impairment or need for maintenance care. The other of the same date is completely different and places the patient at light duty with a return appointment. The patient states that Dr. Sharma advised her that he would order an MRI and have her follow-up with Dr. Walden. When contacting the MRI facility today they advised that a request had been submitted for MRI by Dr. Sharma but the study had not been completed…"

21. Dr. Castrejon summarized; "…Based upon my examination of the patient I am concerned with regard to her clinical examination that is supportive for internal derangement as well as the two opposing forms completed by Dr. Sharma on the same date. One form was provided to the patient and the other to the insurance carrier. I question what Dr. Sharma was actually considering at the completion of both documents. It would appear that he had concerns with regard to the patient's condition yet opted to place the patient at MMI for insurance purposes. My opinion is that the patient is not at MMI and that she requires repeat MRI and additional treatment…" Dr. Castrejon imposed work restrictions.

22. The ALJ finds that the record raises an ambiguity concerning whether the claimant was actually placed at MMI by Dr. Sharma on December 1, 2015.

23. Subsequently, on May 1, 2015 Dr. Sharma authored two documents at the behest of the respondent-insurer that are supportive of his finding the claimant to be at MMI on December 1, 2015. However, there is no indication that it was brought to Dr. Sharma's attention that he also found the claimant not to be at MMI on December 1, 2015. The request by the respondent-insurer's counsel merely asks the leading question of "whether or not you are still of the opinion that the claimant is at MMI as of December 1, 2014." To which Dr. Sharma X'd the form next to "Claimant is at MMI."

24. The record is devoid of any explanation from Dr. Sharma as to why he authored the WC164 on December 1, 2015 indicating that the claimant was not at MMI and why he indicated the claimant needed further diagnostic studies and a referral to Dr. Walden, all of which suddenly disappeared after the claimant left the clinic assuming she had a follow-up appointment with Dr. Sharma.

25. In fact Dr. Sharma authored the referral documentation for the referral to Dr. Walden in conjunction with the WC164 that provides for the referral.

26. Despite the form letter sent to Dr. Sharma and returned by him to the respondents, the ALJ finds that the ambiguity in the records supports by a preponderance of the evidence the fact that the claimant was not placed at MMI on December 1, 2014. The ALJ finds that Dr. Sharma's documents generated on May 1, 2015 are not credible in the face of the totality of the evidence presented, especially the medical documentation produced by Dr. Castrejon beginning on December 18, 2014, just 17 days later, wherein he finds considerable reason to be concerned about the condition of the claimant's knee and where he opines that the claimant is not at MMI and needs further treatment.

27. On January 16, 2015, Dr. Castrejon noted the claimant had not undergone the repeat MRI, "…and is unable to pay for it on her own." On February 5, 2015, Dr. Castrejon repeated that observation, and prescribed Norco for the claimant.

28. The respondent-insurer filed a Final Admission of Liability on March 4, 2015. In a pre-hearing conference order dated May 11, 2015, Judge DeMarino granted the claimant's motion to hold a DIME in abeyance, and to add MMI as an issue for hearing.

29. On March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment. Prior to this, the claimant paid $650.00 out-of-pocket for her treatment with Dr. Castrejon.

30. On March 19, 2015, Dr. Castrejon reported, "…Due to worsening pain requiring increased use of medication I have placed her on Butrans patch 10 mcg/hr. I will see her back in 1 month to review MRI and provide further rec's."

31. The claimant underwent a repeat MRI of her right knee on March 28, 2015. Dr. Castrejon reviewed it on April 20, 2015. He noted, "…A recent MRI has revealed a complex tear of the anterior horn of the lateral meniscus with extension to the femoral articular surface and possible oblique tear of the posterior horn of the lateral meniscus with extension to the tibial articular surface." He reported that "This would be consistent with her condition." Dr. Castrejon referred the claimant to orthopedist Dr. Michael Simpson. He confirmed she was not at MMI and required ongoing work restrictions.

32. Dr. Simpson examined the claimant on April 27, 2015. He reviewed her history, and noted that; "…In mid September, she was doing therapy, going up and down stairs, felt a sudden explosive sensation in her knee and had increasing pain in her knee…She continues to have sensation of swelling, limping, and the episodes of giving away. She had a recent MRI which shows complex tear of the lateral meniscus…" Dr. Simpson recommended EMG testing because, "…I think we need to find out to make sure she does not have a compressive neuropathy at her fibular neck. She did get hit in this area. This could explain some of her nerve pain and continued symptoms that she had…" Dr. Simpson also administered a diagnostic injection and opined that, "…I think she will probably ultimately require an arthroscopic lateral meniscectomy…"

33. Dr. Castrejon performed the recommended EMG testing on May 27, 2015 and reported the results were normal.

34. On June 10, 2015, Dr. Castrejon noted he spoke with Dr. Simpson, and "…I have voiced my opinion in terms of cultural differences with regard to pain and the chronic nature of her condition that has contributed to alteration of gait and diffuse distribution of her symptoms. She has, however, continued working and did achieve benefit with the steroid injection that supports good motivation on the part of the patient. She will be getting scheduled for surgery and I will see her back in 3-4 weeks for post operative care..."

35. Dr. Simpson performed right knee arthroscopic lateral meniscal repair surgery on July 9, 2015. Dr. Castrejon took the claimant off work as of that date.

36. Dr. Castrejon recommended physical therapy on July 13, 2015. The claimant began physical therapy on July 15, 2015.

37. The ALJ finds Dr. Castrejon's opinions and reasoning regarding the claimant having not reached MMI are more credible and persuasive than the contrary, conflicting opinions that Dr. Sharma issued regarding MMI.

38. The respondents have stipulated in their position statement that the claimant's average weekly wage is $659.68.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

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

4. "Maximum medical improvement" means:

> …a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no

> further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement. C.R.S. §8-40-201(11.5)

5. An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement. C.R.S. §8-42-107(8)(b)(I).

6. If either party disputes the determination of MMI, the claimant must undergo a Division IME. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995); C.R.S. §8-42-107(8)(b)(II).

7. A Division IME is not a pre-requisite to the ALJ's resolution of a factual dispute concerning the issuance of conflicting or ambiguous opinions concerning whether the claimant has reached MMI. *Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo. App. 1996). Where the authorized treating physician issues conflicting opinions concerning MMI, it is for the ALJ to resolve the conflict, and the ALJ may do so without requiring the claimant to obtain a Division IME. *Id.*

8. Here, Dr. Sharma issued conflicting opinions regarding MMI. In a one WC164 form dated December 1, 2014, with no narrative, he indicated the claimant reached MMI on December 1, 2014 with no restrictions, no impairment, and no need for treatment after MMI. In another WC164 form of the same date, Dr. Sharma indicated he claimant had not reached MMI; that she continued to require temporary work restrictions; that he referred her for a repeat MRI; that he referred her to Dr. Walden; and that she was to return on December 17, 2014 at 10:30 a.m. This WC164 was provided to the claimant. Dr. Sharma also completed a form entitled "Extremity Initial Assessment" in which he indicated the claimant's right knee pain was not improved. He again specifically referred the claimant back to Premier Orthopedic (Dr. Walden); recommended a repeat MRI; imposed 25 pound restrictions, and instructed the claimant to follow-up on December 17, 2014. Dr. Sharma also completed a specific referral form for the claimant to have a "high field 1.5T open MRI" of her right knee at Colorado Springs Imaging.

9. The ALJ notes that in the "discharge plan" section of his ""Extremity Initial Assessment" report dated December 1, 2014, after referring the claimant back to Dr. Walden at Premier Orthopedics and recommending a repeat MRI, Dr. Sharma appears to have written, "MMI if above are negative." The ALJ concludes Dr. Sharma actual determination was that the claimant was not at MMI on December 1, 2014, but she might be at MMI in the future, pending the outcome of the referral back to Dr. Walden, and the repeat MRI. The claimant's repeat MRI was not negative, per Dr. Simpson and Dr. Castrejon. The claimant came under the care of Dr. Castrejon, who confirmed she was not at MMI. Dr. Simpson ultimately performed knee surgery on July 9, 2015. The ALJ resolves Dr. Sharma's conflicting opinions regarding MMI by determining the claimant was not at MMI on December 1, 2014 and has not yet reached MMI. The ALJ also is persuaded by the fact that on March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment.

10. Because this matter is compensable, the respondent-insurer is liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The treatment the claimant received from Dr. Castrejon and his referrals was and is reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant of the effects of the injury. respondent-insurer is liable for reimbursement to the claimant for her out-of-pocket expenses to treat with Dr. Castrejon beginning December 18, 2014.

11. 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. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's

ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

12. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

13. Here, the claimant testified she was scheduled to be off work the two days after her injury. She was seen at Penrose after 10:00 p.m. on August 13, 2014. PA Welpton at Penrose took the claimant off work two days. Those days would have been August 14 and 15. On August 15, Dr. Sharma took the claimant off work August 15-17 and released her to return to work with restrictions on August 18. The claimant is entitled to TTD benefits from August 13 through August 17.

14. The claimant is entitled to TPD benefits August 18-21 per Dr. Sharma's release to modified work.

15. On August 22, 2014, Dr. Sharma took the claimant off work August 22-24 and released her to return to work with restrictions on August 25. The claimant is entitled to TTD benefits August 22-24.

16. Beginning August 25, 2014, the claimant was under temporary work restrictions, initially from Dr. Sharma, then from Dr. Castrejon when he began treating the claimant on December 18, 2014. The claimant is entitled to TPD benefits from August 25, 2014 through July 8, 2015.

17. The claimant underwent knee surgery with Dr. Simpson on July 9, 2015. Dr. Castrejon took the claimant off work as of the date of surgery. The claimant is entitled to TTD benefits as of July 9, 2015 and continuing.

18. Pursuant to § 8-43-404 (5)(a)(I)(A), C.R.S., as applicable to the claimant's date of injury, the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984).

19. Here, respondent-employer's list of medical providers failed to comply with the requirements of C.R.S. §8-43-404(5)(a)(I)(A), and W.C.R.P. 8-2 as applicable to the claimant's date of injury. Specifically, the list was not delivered to the claimant in a verifiable manner, and a medical provider was already circled and selected for the

claimant by respondent-employer's management. The claimant was deprived of the opportunity to select her own treating provider. Because respondent-employer's list of medical providers was non-compliant, the right of selection passed to the claimant. The claimant selected Miguel Castrejon, M.D., and he began treating her on December 18, 2014. Dr. Castrejon is an authorized treating physician as of that date.

20. Moreover, when the claimant returned to see Dr. Sharma on December 17, 2014 he refused to see her. The claimant sought emergent care at Penrose Hospital. Penrose referred the claimant to Dr. Rahill in Dr. Castrejon's office. The claimant called to make an appointment, accepted the offer to see a Spanish speaking physician, and saw Dr. Castrejon the following day. The respondent-insurer did not designate a new treating physician after Dr. Sharma refused to treat the claimant. Later, on March 10, 2015, Dr. Sharma specifically referred the claimant to Dr. Castrejon.

ORDER

It is therefore ordered that:

1. The claimant has never reached MMI from the time of her injury to the hearing date.

2. The respondent-insurer shall reimburse Claimant $650.00 for the out-of-pocket expenses she incurred to treat with Dr. Castrejon beginning December 18, 2014.

3. The respondent-insurer is liable for all reasonable and necessary medical treatment needed to cure and relieve the claimant of the effects of the injury.

4. Claimant's AWW is $659.68.

5. The respondent-insurer shall pay the claimant TTD benefits from August 13 through August 17, 2014.

6. The respondent-insurer shall pay the claimant TPD benefits from August 18 through August 21, 2014.

7. The respondent-insurer shall pay the claimant TTD benefits August 22 through August 24, 2014.

8. The respondent-insurer shall pay the claimant TPD benefits from August 25, 2014 through July 8, 2015.

9. The respondent-insurer shall pay the claimant TTD benefits from July 9, 2015 ongoing, until such benefits can be terminated pursuant to law.

10. Dr. Castrejon is an authorized treating physician as of December 18, 2014.

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

12. 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: September 17, 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 for determination are:

1. Maximum medical improvement;

2. Medical benefits;

3. Average weekly wage;

4. TPD and TTD benefits;

5. Whether the right of selection of the treating physician has passed to the claimant; and,

6. Change of physician.

FINDINGS OF FACT

1. The claimant is a 40 year old food preparation worker who injured her right knee while working at the respondent-employer's restaurant on August 9, 2014. The claimant reported the injury to a Kitchen Manager named Casey on the day it happened. The respondent-employer took no action at that time. The claimant was off work the next several days. When she returned to work on August 13, 2014 she reported the injury to a Store Manager named Amber. Amber filled out a report and gave the claimant a list of medical providers. Premier Urgent Care was already circled.

2. A co-worker, Heather, drove the claimant to Premier Urgent Care. It was closed. They returned to the restaurant. Management instructed the co-worker to take the claimant to Penrose Hospital. The claimant presented to the emergency room at Penrose Hospital at approximately 10:00 p.m. She was diagnosed with "right knee sprain versus contusion," and was taken off work for two days.

3. The claimant presented to Anjmun Sharma, M.D., at Premier Urgent Care on August 14, 2014. Dr. Sharma diagnosed "right knee internal derangement." He prescribed a hinged knee brace, Percocet, physical therapy, and an MRI. He imposed work restrictions, and took the claimant off work August 15 to August 17, 2014. He released her to return to work with restrictions from August 18-22.

4. The claimant underwent a MRI of her right knee on August 19, 2014. It revealed mild patellofemoral joint effusion, with "small area of focal nodular synovitis in the ventral aspect of the anterior horn of the lateral meniscus extending into the intercondylar notch anteriorly. Associated degenerative changes with intrasubstance heterogeneous increased T2 signal involving the anterior horn of the lateral meniscus without evidence of tear."

5. On August 22, 2014, Dr. Sharma reviewed the MRI results. He diagnosed right knee sprain and right knee contusion. Dr. Sharma took the claimant off work from August 22 to August 24, 2014, and released to return to work with restrictions August 25 to September 10.

6. The claimant began physical therapy at Northgate Physical Therapy ("Northgate") on August 22, 2014. Therapist Ben Saunders noted, "…She states she heard a pop when she hit her knee and continues to have popping in the knee." Mr. Saunders noted the MRI revealed "focal nodular synovitis lateral meniscus."

7. As part of her physical therapy, the claimant was instructed to ambulate up and down stairs without assistive devices. While doing so at Northgate in September, 2014, the claimant experienced sudden pain and what she testified felt like an "explosion" in her right knee.

8. On September 10, 2014, Dr. Sharma recommended an orthopedic evaluation, and continued work restrictions September 10-15.

9. Orthopedist David Walden, M.D., saw the claimant on September 11, 2014. Dr. Walden noted the claimant tried physical therapy, "…which only made the situation worse." He reviewed the MRI and noted, "…It shows some minor changes in the anterior horn of the lateral meniscus as well as the associated notch." Dr. Walden noted the claimant's knee was hypersensitive and she had "fairly diffuse pain." He indicated that; "...Although not classic for reflex sympathetic dystrophy, there may be some elements of sympathetically mediated pain and I would recommend referral to a pain specialist with consideration for neurotrophic agents or sympathetic blocks…For now, physical therapy would probably make her situation worse…"

10. Dr. Sharma saw the claimant on September 15, 2014. He did not refer to her to a pain specialist, as Dr. Walden recommended. He prescribed Neurontin and noted "can resume gentle PT" despite Dr. Walden's opinion that physical therapy would probably make the situation worse. He continued work restrictions through October 6, 2014.

11. On October 10, 2014, Dr. Sharma continued work restrictions to November 5, 2014.

12. The claimant began seeing a new therapist, Fawn Lewis, at Northgate on October 15, 2014. Ms. Lewis noted she was "unable to assess meniscus." On October 17, 2014, Ms. Lewis noted, "…She states her knee pain is worse than when she had an MRI completed on 8/20/14." On October 21, 2014, Ms. Lewis noted, "Patient states: a lot of pain, c/o popping in front of knee." On October 23, 2014, Ms. Lewis noted, "Patient states: cont'd c/o pain in front and back of knee." On October 28, 2014, Ms. Lewis noted, "Patient states: pain increased yesterday, no known cause. Pain on side of patella, which hurts to touch or brush pants leg across it." On November 5, 2014, Ms. Lewis noted, "Chief complaints of pain below knee and lateral and posterior knee, preventing her from walking normally and doing her normal job duties. Stairs significantly increases pain and she c/o frequent popping in her patella…"

13. On November 5, 2014, Dr. Sharma diagnosed right patellar tracking, and right quadriceps atrophy. He continued the claimant's work restrictions.

14. On December 1, 2014 Dr. Sharma inexplicitly indicated the claimant reached MMI with no restrictions, no impairment, and no need for treatment after MMI.

15. Also inexplicitly on December 1, 2014, Dr. Sharma reported the claimant was *not* at MMI. He reported the claimant's right knee pain was "not improved." He referred the claimant back to Dr. Walden, and ordered a repeat MRI. He noted, "MMI if above are negative. F/u on 12/17/14." He maintained her temporary work restrictions.

16. When the claimant attempted to return to Dr. Sharma on December 17, 2014 he refused to see her. The claimant then presented to the emergency room at Penrose Hospital because she needed medical treatment. The emergency room physician diagnosed "right knee pain" and recommended the claimant "Continue to ice the knee, take Ibuprofen or Aleve, and follow up with an orthopedic surgeon for further evaluation and treatment." The claimant was referred to orthopedic surgeon Paul Rahill, M.D.

17. The claimant credibly testified she contacted Dr. Rahill's office by telephone and was asked whether she preferred to see a Spanish or English speaking doctor. She indicated Spanish. She was told she would see Dr. Miguel Castrejon.

18. Dr. Castrejon examined the claimant on December 18, 2014. He noted that, "…In mid September she was participating in physical therapy. She was going up and down stairs as part of her exercise program. As she performed this activity she

states that she had a sudden 'explosive' sensation within her knee that was followed by severe pain that has persisted. Prior to this event she states that she was improving." Dr. Castrejon noted the claimant, "…is reporting moderate to severe knee pain with sensation of swelling, weakness, limping and episodes of giving way. There is popping within the knee." Under "objective findings," Dr. Castrejon noted,"…Unable to heel and toe walk. Antalgic gait. Trace effusion. Quad 4/5 with atrophy. Tender with patellar compression and at lateral joint line. There is a popping sensation to her knee that is intermittently reproducible with McMurray. No instability." Dr. Castrejon diagnosed "right knee contusion/strain with reinjury in September 2014 rule out internal derangement."

19. Dr. Castrejon reviewed the claimant's MRI and noted, "…The study is not normal. There are degenerative changes within the lateral meniscus with synovitis and patellofemoral joint effusion. When seen by Dr. Sharma on 11/5/14 he documented right knee patellar tracking and quadriceps atrophy…"

20. Dr. Castrejon addressed the conflicting reports issued by Dr. Sharma; "…When seen on 12/1/14 he completed two WC164 forms. One form documents the claimant at MMI with diagnosis of right knee pain status post sprain with no restrictions and no impairment or need for maintenance care. The other of the same date is completely different and places the patient at light duty with a return appointment. The patient states that Dr. Sharma advised her that he would order an MRI and have her follow-up with Dr. Walden. When contacting the MRI facility today they advised that a request had been submitted for MRI by Dr. Sharma but the study had not been completed…"

21. Dr. Castrejon summarized; "…Based upon my examination of the patient I am concerned with regard to her clinical examination that is supportive for internal derangement as well as the two opposing forms completed by Dr. Sharma on the same date. One form was provided to the patient and the other to the insurance carrier. I question what Dr. Sharma was actually considering at the completion of both documents. It would appear that he had concerns with regard to the patient's condition yet opted to place the patient at MMI for insurance purposes. My opinion is that the patient is not at MMI and that she requires repeat MRI and additional treatment…" Dr. Castrejon imposed work restrictions.

22. The ALJ finds that the record raises an ambiguity concerning whether the claimant was actually placed at MMI by Dr. Sharma on December 1, 2015.

23. Subsequently, on May 1, 2015 Dr. Sharma authored two documents at the behest of the respondent-insurer that are supportive of his finding the claimant to be at MMI on December 1, 2015. However, there is no indication that it was brought to Dr. Sharma's attention that he also found the claimant not to be at MMI on December 1, 2015. The request by the respondent-insurer's counsel merely asks the leading question of "whether or not you are still of the opinion that the claimant is at MMI as of December 1, 2014." To which Dr. Sharma X'd the form next to "Claimant is at MMI."

24. The record is devoid of any explanation from Dr. Sharma as to why he authored the WC164 on December 1, 2015 indicating that the claimant was not at MMI and why he indicated the claimant needed further diagnostic studies and a referral to Dr. Walden, all of which suddenly disappeared after the claimant left the clinic assuming she had a follow-up appointment with Dr. Sharma.

25. In fact Dr. Sharma authored the referral documentation for the referral to Dr. Walden in conjunction with the WC164 that provides for the referral.

26. Despite the form letter sent to Dr. Sharma and returned by him to the respondents, the ALJ finds that the ambiguity in the records supports by a preponderance of the evidence the fact that the claimant was not placed at MMI on December 1, 2015. The ALJ finds that Dr. Sharma's documents generated on May 1, 2015 are not credible in the face of the totality of the evidence presented, especially the medical documentation produced by Dr. Castrejon beginning on December 18, 2014, just 17 days later, wherein he finds considerable reason to be concerned about the condition of the claimant's knee and where he opines that the claimant is not at MMI and needs further treatment.

27. On January 16, 2015, Dr. Castrejon noted the claimant had not undergone the repeat MRI, "…and is unable to pay for it on her own." On February 5, 2015, Dr. Castrejon repeated that observation, and prescribed Norco for the claimant.

28. The respondent-insurer filed a Final Admission of Liability on March 4, 2015. In a pre-hearing conference order dated May 11, 2015, Judge DeMarino granted the claimant's motion to hold a DIME in abeyance, and to add MMI as an issue for hearing.

29. On March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment. Prior to this, the claimant paid $650.00 out-of-pocket for her treatment with Dr. Castrejon.

30. On March 19, 2015, Dr. Castrejon reported, "…Due to worsening pain requiring increased use of medication I have placed her on Butrans patch 10 mcg/hr. I will see her back in 1 month to review MRI and provide further rec's."

31. The claimant underwent a repeat MRI of her right knee on March 28, 2015. Dr. Castrejon reviewed it on April 20, 2015. He noted, "…A recent MRI has revealed a complex tear of the anterior horn of the lateral meniscus with extension to the femoral articular surface and possible oblique tear of the posterior horn of the lateral meniscus with extension to the tibial articular surface." He reported that "This would be consistent with her condition." Dr. Castrejon referred the claimant to orthopedist Dr. Michael Simpson. He confirmed she was not at MMI and required ongoing work restrictions.

32. Dr. Simpson examined the claimant on April 27, 2015. He reviewed her history, and noted that; "…In mid September, she was doing therapy, going up and down stairs, felt a sudden explosive sensation in her knee and had increasing pain in her knee…She continues to have sensation of swelling, limping, and the episodes of giving away. She had a recent MRI which shows complex tear of the lateral meniscus…" Dr. Simpson recommended EMG testing because, "…I think we need to find out to make sure she does not have a compressive neuropathy at her fibular neck. She did get hit in this area. This could explain some of her nerve pain and continued symptoms that she had…" Dr. Simpson also administered a diagnostic injection and opined that, "…I think she will probably ultimately require an arthroscopic lateral meniscectomy…"

33. Dr. Castrejon performed the recommended EMG testing on May 27, 2015 and reported the results were normal.

34. On June 10, 2015, Dr. Castrejon noted he spoke with Dr. Simpson, and "…I have voiced my opinion in terms of cultural differences with regard to pain and the chronic nature of her condition that has contributed to alteration of gait and diffuse distribution of her symptoms. She has, however, continued working and did achieve benefit with the steroid injection that supports good motivation on the part of the patient. She will be getting scheduled for surgery and I will see her back in 3-4 weeks for post operative care..."

35. Dr. Simpson performed right knee arthroscopic lateral meniscal repair surgery on July 9, 2015. Dr. Castrejon took the claimant off work as of that date.

36. Dr. Castrejon recommended physical therapy on July 13, 2015. The claimant began physical therapy on July 15, 2015.

37. The ALJ finds Dr. Castrejon's opinions and reasoning regarding the claimant having not reached MMI are more credible and persuasive than the contrary, conflicting opinions that Dr. Sharma issued regarding MMI.

38. The respondents have stipulated in their position statement that the claimant's average weekly wage is $659.68.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

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

4. "Maximum medical improvement" means:

> …a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is

> reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement. C.R.S. §8-40-201(11.5)

5. An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement. C.R.S. §8-42-107(8)(b)(I).

6. If either party disputes the determination of MMI, the claimant must undergo a Division IME. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995); C.R.S. §8-42-107(8)(b)(II).

7. A Division IME is not a pre-requisite to the ALJ's resolution of a factual dispute concerning the issuance of conflicting or ambiguous opinions concerning whether the claimant has reached MMI. *Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo. App. 1996). Where the authorized treating physician issues conflicting opinions concerning MMI, it is for the ALJ to resolve the conflict, and the ALJ may do so without requiring the claimant to obtain a Division IME. *Id.*

8. Here, Dr. Sharma issued conflicting opinions regarding MMI. In a one WC164 form dated December 1, 2014, with no narrative, he indicated the claimant reached MMI on December 1, 2014 with no restrictions, no impairment, and no need for treatment after MMI. In another WC164 form of the same date, Dr. Sharma indicated he claimant had not reached MMI; that she continued to require temporary work restrictions; that he referred her for a repeat MRI; that he referred her to Dr. Walden; and that she was to return on December 17, 2014 at 10:30 a.m. This WC164 was provided to the claimant. Dr. Sharma also completed a form entitled "Extremity Initial Assessment" in which he indicated the claimant's right knee pain was not improved. He again specifically referred the claimant back to Premier Orthopedic (Dr. Walden); recommended a repeat MRI; imposed 25 pound restrictions, and instructed the claimant to follow-up on December 17, 2014. Dr. Sharma also completed a specific referral form for the claimant to have a "high field 1.5T open MRI" of her right knee at Colorado Springs Imaging.

9. The ALJ notes that in the "discharge plan" section of his ""Extremity Initial Assessment" report dated December 1, 2014, after referring the claimant back to Dr. Walden at Premier Orthopedics and recommending a repeat MRI, Dr. Sharma appears

to have written, “MMI if above are negative.” The ALJ concludes Dr. Sharma actual determination was that the claimant was not at MMI on December 1, 2014, but she might be at MMI in the future, pending the outcome of the referral back to Dr. Walden, and the repeat MRI. The claimant’s repeat MRI was not negative, per Dr. Simpson and Dr. Castrejon. The claimant came under the care of Dr. Castrejon, who confirmed she was not at MMI. Dr. Simpson ultimately performed knee surgery on July 9, 2015. The ALJ resolves Dr. Sharma’s conflicting opinions regarding MMI by determining the claimant was not at MMI on December 1, 2014 and has not yet reached MMI. The ALJ also is persuaded by the fact that on March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment.

10. Because this matter is compensable, the respondent-insurer is liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The treatment the claimant received from Dr. Castrejon and his referrals was and is reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant of the effects of the injury. respondent-insurer is liable for reimbursement to the claimant for her out-of-pocket expenses to treat with Dr. Castrejon beginning December 18, 2014.

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

12. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

13. Here, the claimant testified she was scheduled to be off work the two days after her injury. She was seen at Penrose after 10:00 p.m. on August 13, 2014. PA Welpton at Penrose took the claimant off work two days. Those days would have been August 14 and 15. On August 15, Dr. Sharma took the claimant off work August 15-17 and released her to return to work with restrictions on August 18. The claimant is entitled to TTD benefits from August 13 through August 17.

14. The claimant is entitled to TPD benefits August 18-21 per Dr. Sharma's release to modified work.

15. On August 22, 2014, Dr. Sharma took the claimant off work August 22-24 and released her to return to work with restrictions on August 25. The claimant is entitled to TTD benefits August 22-24.

16. Beginning August 25, 2014, the claimant was under temporary work restrictions, initially from Dr. Sharma, then from Dr. Castrejon when he began treating the claimant on December 18, 2014. The claimant is entitled to TPD benefits from August 25, 2014 through July 8, 2015.

17. The claimant underwent knee surgery with Dr. Simpson on July 9, 2015. Dr. Castrejon took the claimant off work as of the date of surgery. The claimant is entitled to TTD benefits as of July 9, 2015 and continuing.

18. Pursuant to § 8-43-404 (5)(a)(I)(A), C.R.S., as applicable to the claimant's date of injury, the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984).

19. Here, respondent-employer's list of medical providers failed to comply with the requirements of C.R.S. §8-43-404(5)(a)(I)(A), and W.C.R.P. 8-2 as applicable to the claimant's date of injury. Specifically, the list was not delivered to the claimant in a verifiable manner, and a medical provider was already circled and selected for the claimant by respondent-employer's management. The claimant was deprived of the opportunity to select her own treating provider. Because respondent-employer's list of medical providers was non-compliant, the right of selection passed to the claimant. The

claimant selected Miguel Castrejon, M.D., and he began treating her on December 18, 2014. Dr. Castrejon is an authorized treating physician as of that date.

20. Moreover, when the claimant returned to see Dr. Sharma on December 17, 2014 he refused to see her. The claimant sought emergent care at Penrose Hospital. Penrose referred the claimant to Dr. Rahill in Dr. Castrejon's office. The claimant called to make an appointment, accepted the offer to see a Spanish speaking physician, and saw Dr. Castrejon the following day. The respondent-insurer did not designate a new treating physician after Dr. Sharma refused to treat the claimant. Later, on March 10, 2015, Dr. Sharma specifically referred the claimant to Dr. Castrejon.

ORDER

It is therefore ordered that:

1. The claimant has never reached MMI from the time of her injury to the hearing date.

2. The respondent-insurer shall reimburse Claimant $650.00 for the out-of-pocket expenses she incurred to treat with Dr. Castrejon beginning December 18, 2014.

3. The respondent-insurer is liable for all reasonable and necessary medical treatment needed to cure and relieve the claimant of the effects of the injury.

4. Claimant's AWW is $659.68.

5. The respondent-insurer shall pay the claimant TTD benefits from August 13 through August 17, 2014.

6. The respondent-insurer shall pay the claimant TPD benefits from August 18 through August 21, 2014.

7. The respondent-insurer shall pay the claimant TTD benefits August 22 through August 24, 2014.

8. The respondent-insurer shall pay the claimant TPD benefits from August 25, 2014 through July 8, 2015.

9. The respondent-insurer shall pay the claimant TTD benefits from July 9, 2015 ongoing, until such benefits can be terminated pursuant to law.

10. Dr. Castrejon is an authorized treating physician as of December 18, 2014.

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

12. 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: September 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

- Whether claimant has proven by a preponderance of the evidence that his low back condition is related to the admitted August 1, 2014 work injury?

- If claimant has proven that his low back condition is a compensable component to the admitted August 1, 2014 work injury, whether claimant has proven by a preponderance of the evidence that the medical treatment including the epidural steroid injection ("ESI") are reasonable and necessary medical treatment designated to cure and relieve claimant from the effects of the work injury?

- Whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased from the admitted rate of $1,200.00 to $1,665.04?

FINDINGS OF FACT

1. Claimant was employed as a mobile diesel mechanic for employer. Claimant sustained an admitted injury to his left knee on August 1, 2014 when he was moving batteries that weighed approximately sixty (60) pounds into the back of his work truck, bent down and felt a pop in his left knee. Claimant testified he reported his injury to his employer the following Monday. Specifically, claimant testified he reported the injury to Mr. Morgan, his supervisor, who contacted human resources and took claimant to St. Mary's Occupational Health.

2. Claimant was examined at St. Mary's Occupational Health by Mr. Harkreader on August 4, 2014. Mr. Harkreader noted claimant's accident history and noted on examination that claimant had a possible lateral meniscus tear. Mr. Harkreader recommended an x-ray, magnetic resonance image ("MRI") of the left knee and referred claimant to Dr. Vance for orthopedic evaluation.

3. Dr. Vance initially evaluated claimant on August 11, 2014. Dr. Vance noted claimant's complaints of lateral and anterior knee pain and reviewed claimant's MRI. Dr. Vance noted that the MRI showed a possible small tear at the attachment of the capsule, but reported that there was not a lateral meniscus tear appreciated on the MRI. Dr. Vance offered claimant with a corticosteroid injection, but claimant declined. Dr. Vance recommended claimant return in 2 weeks.

4. Claimant returned to Dr. Vance on August 25, 2014 with continued complaints of pain. Dr. Vance noted he felt claimant's pain was related to patellafemoral synovitis as opposed to any defects shown on the MRI. Dr. Vance again offered claimant a corticosteroid injection and claimant agreed.

5. Claimant returned to Dr. Vance on September 15, 2014 with complaints that Dr. Vance noted were more consistent with a medial meniscus tear. Dr. Vance noted that a knee arthroscopy with partial menisectomy would be warranted and claimant agreed with the recommendation for surgical intervention.

6. Claimant underwent surgery under the auspices of Dr. Vance on September 30, 2015 consisting of a diagnostic and operative arthroscopy of the left knee with partial debridement of the anterior cruciate ligaments and anterior synovial resection. The surgery revealed a partial treating of the anterior cruciate ligaments with mucoid degeneration and anterior synovitis.

7. Claimant returned to Dr. Vance on October 9, 2014. Dr. Vance noted that claimant was complaining that his low back was very sore and thought it could be due to an antalgic gait. Claimant also reported some popping in his left knee and Dr. Vance assured him this was normal.

8. Claimant testified that when he saw Dr. Vance on October 9, 2014 his back felt out of alignment and he was experiencing discomfort.

9. Claimant was evaluated by Mr. Harkreader on October 14, 2014. Mr. Harkreader noted that claimant was complaining of pain on a scale of 5/10 with some swelling that was worse at the end of the day. Mr. Harkreader continued claimant with a 10 pound lifting restriction.

10. Claimant returned to Dr. Vance on October 30, 2014 and noted he still had complaints of pain and swelling in his knee. Claimant was referred by Dr. Vance to Dr. Copeland for a second opinion to try to determine what was causing his ongoing symptoms.

11. Claimant testified at hearing that on November 2, 2014 he got up from the couch and had a large pop in his knee. Claimant denied falling down after experiencing the pop.

12. Claimant was evaluated by Dr. Copeland on November 5, 2014. Claimant reported the incident with his knee popping to Dr. Copeland and complained of increased swelling after his knee popped. Dr. Copeland recommended claimant proceed with laboratory screening and a repeat MRI of the left knee.

13. Claimant testified he fell at Walmart when he was in the bathroom, causing him to fall face first into the bathroom stall. Claimant testified he experienced numbness into his scrotum and genetalia after this fall. Claimant testified he reported this fall to Dr. Copeland, but Dr. Copeland didn't mention the fall.

14. Claimant returned to Mr. Harkreader on November 11, 2014. Mr. Harkreader noted claimant's pain was at a 5-7 out of 10 and claimant had experienced two episodes where his left knee gave out and he fell to the ground. Mr. Harkreader continued claimant's work restrictions and kept claimant off of work.

15. Claimant returned to Dr. Vance on November 17, 2014. Dr. Vance noted claimant was reporting a sensation in his leg of “feeling like it isn’t there” along with experiencing a fall before being seen by Dr. Copeland. Dr. Vance noted claimant reported numbness in the lateral femoral cutaneous that worsened over the previous two weeks. Dr. Vance noted that claimant’s complaints of numbness in his legs could be related to a L3-L4 nerve root distribution problem and referred claimant for an MRI of his lumbar spine.

16. Claimant called Mr. Harkreader on November 18, 2014 and noted some frustration with his ongoing care. Mr. Harkreader noted that claimant could have two different things going on with his condition and noted that claimant was scheduled to undergo an MRI of his lumbar spine.

17. The MRI was performed on November 21, 2014 and demonstrated a large left, far lateral disk herniation at the L4-L5 level.

18. Claimant was evaluated by Dr. Stagg on November 25, 2014. Claimant noted his fall at Walmart and noted that since then he had a significant amount of back pain with radiation to his left knee. Claimant reported the knee buckled on 2 occasions, causing him to fall. Dr. Stagg noted the MRI showed a lateral disk protrusion at the L4-L5 level. Claimant was referred to Dr. Clifford for consultation with his lumbar spine issues.

19. Claimant was examined by Dr. Clifford on December 4, 2014. Dr. Clifford noted an accident history of claimant lifting a battery using a twisting motion and developing symptoms down to the lateral anterior thigh and down to the lateral calf of the left side. Dr. Clifford noted he felt claimant’s symptoms were related to the lumbar spine, and not his knee. Dr. Clifford recommended transforaminal epidural steroid injections with the use of ice and nonsteroidal anti-inflammatories. Claimant was referred to Dr. Hehmann for electrodiagnostic studies.

20. Claimant subsequently returned to Dr. Stagg on December 29, 2014 with his wife and reported to Dr. Stagg that they did not believe the medical records reflect what they have been telling the providers. They asked Dr. Stagg to state in the records that since the initial injury, claimant has had pain and stiffness in his back with problems sitting, pain in the back and felt that his back was out of alignment.

21. Claimant testified at hearing that he discussed his knee and low back with Dr. Copeland on November 5, 2014. Claimant testified on cross examination that he did not talk with Mr. Harkreader about his low back when he was initially evaluated on August 4, 2014. Claimant testified he didn’t think he had injured his low back as of October 14, 2014 and didn’t talk to the doctors about his low back until the first part of November 2014. Claimant testified, however, that he did tell the doctors he felt his low back was mis-aligned in August, September and October 2014.

22. Claimant testified his low back pain gradually developed and became most serious following his two falls in November 2014.

23. Claimant was evaluated in the Delta County Memorial Hospital Emergency Room on January 19, 2015 with complaints of bowel and bladder control problems that involved both urine and feces. Claimant underwent another MRI that showed L5 changes on the left side consistent with nerve root pressure, but not full impingement.

24. Dr. Vance testified by deposition in this case. Dr. Vance testified that claimant did not begin complaining of issues with his low back until after the surgery. Dr. Vance testified he was unaware that claimant had a history of low back issues in November 2013. Dr. Vance opined that claimant's low back condition could be related to his falls, but testified causation was complicated by the fact that claimant didn't report his prior back complaints to his physicians and indicated to Dr. Stagg that he had been complaining of back issues dating back to August 1, 2014.

25. Claimant had a history of treatment to his low back dating back to April 1, 2012 when he was treated in Idaho at Kootenai Medical Center for left foot numbness and pain extending to the left leg that had been present over the previous month. Claimant underwent x-rays of the lumbar spine that showed degenerative changes. The x-ray report noted that claimant was complaining of radicular pain.

26. Claimant was evaluated at Delta County Memorial Hospital on November 2, 2013 for complaints of back pain after lifting a 50 gallon drum off a truck. Claimant reported left sided back pain and noted he was having a hard time waling due to the back pain. Examination revealed a positive straight leg raise test on the left and claimant reported that he had the urge to go to the bathroom more frequently. Claimant was provided with a steroid injection and provided with prescriptions for Soma and Vicodin.

27. Claimant underwent an independent medical examination ("IME") with Dr. Scott on March 18, 2015. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott noted claimant reported to him that his back condition was accelerated by his first and second falls. Dr. Scott noted claimant reported he had pulled a muscle in his low back in November 2013 when he moved a heavy drum of a truck. Claimant reported after this incident his back returned to normal and he had no stiffness in his back prior to the August 1, 2014 work injury.

28. Dr. Scott noted that claimant's November 2013 back injury resulted in a diagnosis of acute low back pain and lumbar radiculopathy. Dr. Scott ultimately opined in his report that claimant did not have an injury or an aggravation to his low back on August 1, 2014.

29. Dr. Scott testified at hearing consistent with his medical report. Dr. Scott testified that the medical records do not document an altered gait after October 9, 2014 and opined claimant's back condition was not the result of an altered gait from the knee injury. Dr. Scott testified claimant's falls in November 2014 were likely caused by claimant's back condition and not related to his knee surgery. Dr. Scott noted that

claimant's knee condition was stable. Dr. Scott testified claimant's low back evaluation and treatment was not related to claimant's August 1, 2014 knee injury.

30. Dr. Vance testified that claimant's buckling of his knee could have been related to the knee surgery, but admitted that he couldn't identify any instability of the knee related to the surgery.

31. The ALJ credits the reports and opinions of Dr. Scott and finds that claimant has failed to demonstrate that it is more likely true than not that his current low back complaints are related to the August 1, 2014 compensable knee injury. The ALJ notes that claimant reported to Dr. Stagg in December 2014 that he had been complaining of back complaints since the date of injury, but testified at hearing that his back complaints were limited to his back being mis-aligned. The ALJ also notes that claimant's wife testified at hearing and confirmed that claimant was not complaining of low back problems in August 2014.

32. The ALJ further finds that claimant has alleged that the low back condition was related to the falls, which are then related to the August 2014 knee injury. However, insufficient evidence was presented at hearing to establish that either of the falls claimant experienced in November 2014 were related to his left knee injury. The ALJ credits the medical records and the testimony of Dr. Vance that claimant's left knee was stable and finds that claimant has failed to demonstrate that the knee giving out in November 2014 was related to the August 2014 knee injury.

33. Moreover, this argument that the low back condition was related to the falls is undermined by the visit with Dr. Stagg on December 29, 2014 where claimant asked Dr. Stagg to document that he was complaining of low back pain since his initial injury in August 2014.

34. Based on the foregoing, the ALJ finds that claimant has failed to meet his burden of proving that his low back complaints are related to the August 1, 2014 admitted left knee injury. The ALJ further finds that claimant has failed to establish that his low back condition was related to falls in November 2014 that would be traced back to the August 1, 2014 work injury to his left knee.

35. Claimant testified at hearing that he was paid $30 per hour. The wage records entered into evidence establish that claimant was paid at a rate of $30 per hour at the time of his injury. The wage records further establish that in the 10 weeks prior to claimant's injury, claimant earned $16,650.36. The ALJ finds that this equates to an appropriate AWW calculation of $1,665.04.

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 failed to prove by a preponderance of the evidence that his low back condition was caused, aggravated or accelerated by the August 1, 2014 work injury. As found, claimant has failed to establish by a preponderance of the evidence that his low back condition was caused, aggravated or accelerated by the falls in November 2014 as related to the August 1, 2014 work injury.

5. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

6. As found, claimant earned $16,650.36 in the ten weeks covering the pay periods prior to his injury. As found, claimant has proven by a preponderance of the evidence that his AWW should be increased to $1,665.04 based on the wage records entered into evidence at hearing.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits based on an AWW of $1,665.04.

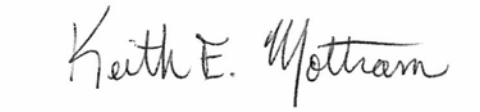
2. Claimant's claim for medical benefits related to his low back injury associated with the August 1, 2014 compensable work injury is denied.

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: September 29, 2015



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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer?

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

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") benefits for the period beginning September 5, 2014 and ending September 8, 2014, and for the period beginning December 8, 2014 and ongoing?

4. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits for the period beginning September 9, 2014 and ending December 7, 2014?

STIPULATIONS

1. After hearing, the parties stipulated that, should the claim be found compensable, the Claimant's average weekly wage shall be $535.00.

FINDINGS OF FACT

1. Claimant is a 29-year-old male, who began working for Employer as a granite fabricator and installer in September 2012. Claimant testified that his job duties included cutting rock and granite, finishing it into finished products (such as kitchen countertops), and installing the products in homes and businesses. Claimant testified that this work involved lifting and moving heavy slabs of granite. Claimant testified he is unsure if he is still employed by Employer as he has had no feedback from the Employer regarding this issue.

2. Claimant testified that he had treatment to his low back in late July and early August 2014 with Dr. Ben Dorenkamp at Dorenkamp Chiropractic. Claimant testified he did not have any medical treatment to his low back at any time prior to his first visit with Dr. Dorenkamp on July 25, 2014. The medical records in evidence support the Claimant's testimony.

3. Dorenkamp Chiropractic's patient history form dated July 25, 2014 noted that Claimant presented with low back pain that began three weeks earlier "after lifting heavy slabs of granite [and] deadlift" (Claimant's Exhibit 5, p. 131; Respondents' Exhibit F, p. 9). Claimant testified that the reference to "lifting heavy slabs of granite" was in regard to his work for Employer. Claimant testified that the reference to "deadlift" was in regard to an after-work exercise activity.

4. Claimant testified that the maximum weight he deadlifted while exercising was 150 pounds. He testified that when he deadlifted, he would lift a weighted bar in his hands from the ground using his legs while holding his low back in a set position. Claimant testified that granite slabs at work weighed between 800 and 1,200 pounds.

5. Claimant testified at hearing that he had been overweight since he was young, and had some back pain since middle school. He testified he had never received medical treatment for his low back prior to having chiropractic care on July 25, 2014 and never missed work due to back pain prior to September 2014.

6. Claimant received chiropractic care with Dr. Dorenkamp on July 25, 2014 and August 1, 2014 (Claimant's Exhibit 5, p. 135; Respondents' Exhibit F, p. 12). Dr. Dorenkamp did not provide any work restrictions at either visit. Claimant testified that he did not return to see Dr. Dorenkamp after August 1 because his symptoms felt somewhat resolved, and he was being careful with money and did not feel that it was worth returning to see the chiropractor. Claimant testified he still had some symptoms after receiving chiropractic care, but testified that his back symptoms did not prevent him from going to work. Claimant testified he did not have any additional treatment after he saw Dr. Dorenkamp on August 1 until after September 5, 2014.

7. On September 4, 2014, the Claimant presented to St. Mary's Medical Center due to concerns with his leg due to his long-term history of venous thrombosis and embolism. He came to the ER to request Coumadin for his condition but did not feel like there was a clot or infection at that time. The ER personnel noted that the options were limited at 3AM in the morning, but provided him with a 5-day prescription for Coumadin and referred him to a social worker who could find a doctor who will work with the Claimant's insurance and get him back with the Coumadin clinic who could follow up. At this visit, the Claimant had no other complaints (Respondents' Exhibit J, pp. 70-74).

8. Claimant testified that he began work on Friday, September 5, 2014 at 7:30 a.m. He testified that although his low back was not symptom-free on the morning of September 5, 2014, it was a normal day.

9. Claimant testified that on September 5, 2014, he moved a slab of granite while working for Employer. He testified that a "slab" of granite is rock that is cut down for further cutting to vanity size. He testified that each slab weighed between 800 and 1,200 pounds. He testified that Employer had a saw table where slabs were placed for cutting. He testified that a slab sat in a trench, and leaned against the table at an angle. He testified that chains are attached to the slab, and that he and another coworker

would generally lift the bottom of the slab upward and use leverage and the weight of the slab itself to gently lay the slab down on the saw table.

10. Claimant testified that on September 5, 2014, his coworkers who usually assist with moving slabs of granite in Employer's shop were installing products in Utah, and were not there. He testified that Tim Mallett, Employer's owner's son, helped him move a granite slab that day. Claimant testified that Tim has been there since before the Claimant started and he works on and off. Tim Mallett testified that he recalled helping the Claimant move a piece of granite on September 5, 2014.

11. Tim Mallett testified at the hearing. Tim Mallett testified that he was the manager of Mor Storage, an associated business of Employer's. He testified that, at times, he performed job duties for Employer. Tim Mallett testified that to get the slab of granite onto the saw table, you don't actually "lift" it. Rather, the slab is leaned against the table and it is supported by chains and all you have to do is tilt it when it swings up off the chains and lay it flat on the table so that it is halfway off the table. Then you slide or push the slab so that it is all the way on the table.

12. Claimant testified that Tim Mallett didn't know what to do on the lift. When the Claimant counted down (1-2-3), the Claimant lifted his part and Tim Mallett didn't pick up or take any weight, so the Claimant had all the weight and he felt his back shift. After lifting the slab, the Claimant felt tremendous pain in his lower back. The Claimant testified that due to the pain, the Claimant had to lie down on the table. The Claimant testified that there was no one to tell about the injury except Tim Mallett because everyone was out of town and the Claimant didn't have anyone's personal cell phone number. Claimant testified that just after this happened, he told Tim Mallett that he did not know what he was doing even though Tim told him that he did, that Tim Mallett did not lift enough of the weight, and that Claimant's back was now "messed up."

13. Tim Mallett testified that after he helped move the granite, he left the back area and did not see the Claimant again that day. Tim Mallett did not recall the Claimant telling him that he did not lift enough of the weight or that the Claimant was hurt. Tim Mallett was not aware what time the Claimant left work on Friday, but when he locked up the shop, the Claimant was no longer there. He testified that he did see the Claimant come in on Saturday, but his doesn't know when the Claimant left that day.

14. Claimant testified that after the injury, he continued to work on that slab on the saw table on Friday, September 5, 2014 for a while because the saw table was automated and didn't require any physical activity. He testified that he left work at approximately 2:00 p.m. because he could not perform his job duties due to his back pain. Claimant testified he did not report his back injury or back pain to Imogene Hampton, Employer's office manager, that day because he believed that she was not onsite. Claimant testified that he did not have Ms. Hampton's personal cell phone number.

15. Imogene Hampton has been employed as the receptionist, bookkeeper, assistant manager and office manager for Employer for about 2 years. She does the payroll and assists with the paperwork for worker's compensation injuries. She testified that prior to September 8, 2014, Claimant had never missed more than one day of work to see a chiropractor. Ms. Hampton testified that she worked a full day on September 5, 2014 and she is the one who went to ask Tim Mallett to help the Claimant with the granite slab. She testified that she does not recall the Claimant telling her on September 5, 2014 that he hurt his back that day when lifting a granite slab with Tim Mallett.

16. Claimant testified that he was scheduled to work the following day, Saturday, September 6, 2014. He testified that he clocked in that morning and planned on working. He testified that he expressed to another employee that his back hurt from lifting a slab of granite the day before. Claimant testified that the employee advised him to sit down to see if his symptoms improved. Claimant testified he still had symptoms and was unable to work. He testified that he and the other employee clocked out and left the premises. He testified he did not report his back injury or back pain to a supervisor because there was not a supervisor on Employer's premises that day.

17. Claimant testified that he tried to go on a hike with his wife and children on Saturday, September 6, 2014, but was unable to hike because of his back symptoms and left after taking a picture at the trail head.

18. Claimant testified that he went to work on Monday September 8, 2014. He testified that he talked to Ms. Hampton about his back injury. He testified he told Ms. Hampton that he hurt his back while lifting granite on Friday, September 5, 2014. Claimant testified Ms. Hampton instructed him to leave work early that day. Tim Mallett testified that he recalled that Claimant told Employer about an injury on Monday, September 8, 2014.

19. Ms. Hampton testified that on September 8, 2014, she went to the back room to see the guys who were working that day and asked how it was going. She testified that the Claimant told her "not good" because his back was hurting. She asked him why and he responded, "lifting all this." Ms. Hampton testified that she told Larry Mallett what Claimant had told her, and that he instructed her to send Claimant home for the day.

20. Larry Mallett, owner of Employer, testified at hearing. He testified that he was familiar with how granite slabs are placed on the saw table. He testified that the slabs are supported by chains and tilted onto the table. He testified that 65% of the slab's weight is on the table. He testified that two people are required to get a slab onto the table. He testified that he understood that one person would lift the slab from the bottom, and one person would push the slab from the top to move it onto the table. He testified: "I believe there's a little lifting" involved in getting granite slabs onto the table.

21. With respect to the conflicting testimony on the Claimant's mechanism of injury, the ALJ finds that, although Tim Mallett testified that lifting is not required when moving a granite slab onto the saw table, Tim Mallett testified that he had only moved approximately 10 slabs of granite onto the saw table at Employer's premises. The ALJ notes that Larry Mallet testified that some lifting is required in order to move slabs onto the saw table. The ALJ finds that the testimony of both Tim and Larry Mallett supports Claimant's testimony that Tim Mallett was not familiar with the way Claimant lifted slabs of granite, and supports Claimant's testimony that Tim Mallett did properly not help Claimant lift the slab. This finding, coupled with the Claimant's overall credible testimony, and the consistency with the medical records, makes it more likely than not that the Claimant did experience an injury while placing a piece of granite on the saw table with the assistance of Tim Mallett on September 5, 2014.

22. With regard to the conflicting testimony regarding whether or not Claimant reported a work injury and when he may have done so, the ALJ finds that Ms. Hampton's testimony supports Claimant's testimony that he reported the injury on Monday, September 8, 2014. The ALJ finds that Ms. Hampton understood on September 8, 2014 that Claimant's low back pain was related to work activities after Claimant told her that his back was hurting after lifting granite. Mr. Larry Mallett testified that he received a phone call from Imogene Hampton on September 8, 2014 who told him that Claimant "was hurting." Mr. Larry Mallett testified that he told Ms. Hampton: "If his back is hurting, send him home." Mr. Larry Mallett testified that Claimant was not staying in touch with Employer after September 8, 2014, and that Mr. Mallett visited Claimant at his home. Mr. Mallett testified that Claimant told him his phone had not been working. Mr. Larry Mallett also testified that Claimant in fact did provide him and Ms. Hampton with medical records from his treatment. While Mr. Mallett may or may not have understood that the Claimant's back pain was work related, this is immaterial where Ms. Hampton, the office manager and person responsible for initiating worker's compensation claims, did clearly understand that the Claimant's back pain was work related. The fact that Ms. Hampton may not have conveyed to Mr. Larry Mallett the nature of the Claimant's back pain, impacts her understanding that, on September 8, 2014, the Claimant had back pain due to lifting granite.

23. Claimant sought medical care on September 8, 2014 at St. Mary's Hospital. Claimant testified he did not go to the hospital until very late that night because he had to coordinate childcare for his four children so that his wife could accompany him.

24. The hospital record notes that on September 8, 2014, Claimant arrived at 11:05 p.m., was admitted to the hospital at 11:44 p.m., and was discharged at 12:29 a.m. on September 9, 2014 (Claimant's Exhibit 3, p. 18; Respondents' Exhibit J, p. 79). Janet Prager, NP, noted at 12:12 a.m. on September 9, 2014 that Claimant had lower back pain, more left-sided than right, with an onset date of five days earlier, and that he reported it worsened the day before he came to the emergency department (Claimant's Exhibit 3, p. 19; Respondents' Exhibit J, p. 80). At the hearing, Claimant that the onset timeframe of five days prior to the date he sought medical care was inaccurate. He testified he did not know why the record stated his pain had started five days earlier,

but testified that he may have just "thrown out a date" when asked by hospital staff. On cross-examination, the Claimant testified that he was casual about the specific date and not careful because he didn't realize that the specific date was important. In another note in the same hospital record for the September 8, 2014 ER visit, the "History of Present Illness" stated: "Lifting heavy things at work. Lower back pain since Friday (3 days ago). Pain goes down to left knee" (Claimant's Exhibit 3, p. 24). Claimant testified that this part of the record stated the correct timeframe: the injury occurred on Friday, September 5, 2014.

25. In the history of present illness, the September 8, 2014 ER note states that "[Claimant] was lifting a lot of heavy granite slabs at work the day that the pain came on. States it radiates to his left thigh to the level of the knee and is in his buttock. States that the pain is sharp and aching and it rates 8/10. States he's had issues with back discomfort in the past but it's never been this bad" (Claimant's Exhibit 3, p. 19; Respondents' Exhibit J, p. 80). Claimant testified that both those statements were accurate. Another note in the September 8, 2014 hospital record stated that Claimant presented to the emergency room with low back pain, which had worsened over the past week, and that Claimant had a very physically active job lifting heavy weight (Claimant's Exhibit 3, p. 21; Respondents' Exhibit J, p. 82). In the paperwork, the "guarantor" for Claimant's medical care was listed as Respondent-Employer (Claimant's Exhibit 3, p. 28; Respondents' Exhibit J, p. 87).

26. Ms. Hampton testified that she did not hear from the Claimant on September 9, 2014 and she kept trying to talk to him or text him by phone but got no response.

27. Claimant returned to St. Mary's Hospital at 11:10 p.m. on September 10, 2014 with a primary complaint of back pain (Claimant's Exhibit 3, p. 30; Respondents' Exhibit J, p. 89). At the hearing, Claimant testified he returned to the emergency room because he still had unbearable back pain. The hospital record notes that the Claimant stated,

> [H]e has had some back pain on and off for the last couple of months ever since he started his new weight lifting regimen to lose weight. He states he's been doing some heavy squatting at the local gym. Additionally he moves granite for a living and does a lot of heavy lifting at work. He was here the last couple of days for the same back pain after he was lifting a lot of heavy rock at work. He states the pain medication he has at home is not working (Claimant's Exhibit 3, p. 31; Respondents' Exhibit J, p. 90).

Claimant testified that he had been given pain medication by hospital staff at his last visit, but that the medications "weren't touching the pain" and the pain was unbearable enough that he had to go to the ER again.

28. Although the Claimant arrived at 11:10 p.m. on September 10, 2014, there was a high volume overload situation at the ER and there was a prolonged wait time. The Claimant finally saw Dr. Bradley Neese, who signed a provider note at 3:54

a.m. on September 11, 2014. Dr. Neese noted that, "the etiology of the patient's symptoms is consistent with acute muscle skeletal back strain likely secondary to improper lifting technique, a significant amount of stress from heavy weightlifting and lifting at work, and associated with poor body habitus to include obesity" (Claimant's Exhibit 3, pp. 30-35; Respondents' Exhibit J, pp. 89-94.

29. Claimant sought medical care with James Haraway, NP at Foresight Family Physicians on September 11, 2014, the same day he was discharged from the hospital. NP Haraway noted that Claimant had injured his low back while at work on September 5, 2014 "doing heavy lifting of granite." NP Haraway noted that Claimant had constant, sharp, and shooting pain in the left side of his low back, and had radiating pain into his left leg. NP Haraway noted that Claimant complained of previous back problems, including occasional mechanical back pain. NP Harwaway increased the Claimant's dose of Oxycodone and advised the Claimant of the "importance of going through employer for work related injury and seeing their preferred provider (Claimant's Exhibit 1, pp. 1-2; Respondents' Exhibit G, pp. 14-15).

30. Ms. Hampton testified that she spoke with Claimant again on September 11, 2014, and asked him whether "this is just the usual, or if he needed to file a state comp claim." She testified that Claimant told her he wasn't sure. Ms. Hampton testified that on the morning of September 12, 2014, she called the Claimant to advise him that if he was filing a work comp claim, she needed him to fill out some paperwork. He told her that he couldn't come in, so she testified that she visited Claimant at his home to fill out paperwork on September 12, 2014. Ms. Hampton testified that she gave Claimant a list of authorized physicians.

31. Ms. Hampton testified that she completed the Employer's First Report of Injury dated September 12, 2014 (Claimant's Exhibit 7, p. 143; Respondents' Exhibit A, p. 1). She noted that Claimant had a "strain" of his "Low Back (Lumbar & Lumbar-Sacral)," and that the mechanism of injury was "moving a slab off the table onto another table, and has back pain." Ms. Hampton testified that the date of injury listed as September 11, 2014 in the First Report was inaccurate. She also testified that the date listed as when Employer was first notified of the injury, September 12, 2014, was also inaccurate. She testified that actually Claimant had told her on the morning of September 8, 2014 that he had back pain from lifting granite. The Employer's First Report of Injury also noted "No Medical Treatment" under the box for "Initial Treatment." When asked whether she was aware that as of September 12, 2014, Claimant had sought medical care at Foresight Family Physicians and on several occasions at St. Mary's Hospital, Ms. Hampton testified that although Claimant had told her he had sought medical care, she "had no proof" that he had care and, without confirmation, she could not know for sure. Ms. Hampton testified that Claimant never gave her a written statement of his injury. However, she acknowledged that she did not give Claimant a form to fill out, but instead just "told him to write a statement on a piece of paper."

32. Ms. Hampton at first testified that after she visited Claimant at his home on September 12, she did not hear anything more from Claimant. However, she then

testified that Claimant's wife, Star Marquez, called in to report that Claimant had a partial work release from a physician and then faxed the medical record to Ms. Hampton.

33. Claimant saw Dr. Dale Utt for an initial evaluation on September 12, 2014. Dr. Utt noted that Claimant was "helping to lift a 100 pound granite tabletop at his place of employment so it could be worked on" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit G, p. 16). Claimant testified that the record is inaccurate, because the slabs of granite weighed between 800 and 1,200 pounds, not 100 pounds. Dr. Utt also noted that Claimant had an inexperienced employee helping him and Claimant "ended up lifting just too much weight and felt low back discomfort at that time" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit G, p. 16). At the hearing, Claimant testified that the "inexperienced employee" mentioned in the record was Tim Mallett. In the medical record, Dr. Utt noted that Claimant's symptoms had become progressively worse over the days following the injury. Dr. Utt noted that Claimant had been to the emergency room twice because of increasing pain in his back and radiating pain to his left thigh and knee. Dr. Utt noted: "Historically he has had just occasional back pain with no events like this and seeing a chiropractor occasionally in the past" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit G, p. 16). Dr. Utt opined that he suspected that Claimant had a ruptured lumbar disc, which "appear[ed] to be work related" (Claimant's Exhibit 1, p. 4; Respondents' Exhibit G, p. 17). Dr. Utt recommended an MRI scan. He also noted that Claimant was "having a very difficult time managing the pain and may end up in the hospital. He indicated that the Claimant may be a candidate for an epidural or early surgical intervention (Claimant's Exhibit 1, p. 4; Respondents' Exhibit G, p. 17).

34. On the "Physician-Employer Communication Form," Dr. Utt indicated that it was medically probable that Claimant's injury was work-related and noted the Claimant was temporarily unable to work (Claimant's Exhibit 1, p. 5). Dr. Utt also produced a Physician's Report of Worker's Compensation Injury on September 14, 2014. He noted that his objective findings were consistent with Claimant's history and with a work-related mechanism of injury. Dr. Utt also noted that Claimant's description of the injury was "lifting a large piece of [granite]." Dr. Utt recommended an MRI and prescribed pain medications. Dr. Utt also listed the Claimant's work status as unable to work from 9/12/14 to 9/18/14 (Claimant's Exhibit 1, p. 6; Respondents' Exhibit G, p. 18).

35. Claimant returned to see Dr. Utt on September 15, 2014. Dr. Utt noted that Claimant was unable to get any relief of his back pain with both oxycodone and gabapentin. Dr. Utt noted that Claimant was tearful, hyperventilating, and could not get comfortable. Dr. Utt noted that Claimant had "intractable back pain" and, because the oral pain medications were not managing his intense pain, the Claimant needed to be admitted to the hospital and have a diagnostic MRI (Claimant's Exhibit 1, p. 7; Respondents' Exhibit G, p. 19).

36. Claimant returned to St. Mary's Hospital the same day he saw Dr. Utt on September 15, 2014. Dr. Saba Rizvi noted that Claimant had injured his back one

week ago lifting a heavy slab of granite Dr. Rizvi noted that Claimant's back pain was not being controlled by medications, and that Claimant had back pain radiating into his left buttock and leg. Dr. Rizvi noted the Claimant was evaluated earlier in the day by Dr. Utt who advised that Claimant go to the ER for further evaluation (Claimant's Exhibits, p. 50; Respondents' Exhibit J, p. 98). The hospital record also noted that Claimant had lifted something heavy ("almost 1,000lb") one and a half weeks prior to admission and had significant back pain radiating into the left leg (Claimant's Exhibit 3, p. 55; Respondents' Exhibit J, p. 110). Claimant testified that this record's timeline was accurate because his injury occurred 10 days before September 15, on September 5. In the medical record for this same visit, Dr. Victor Barton also noted that "approximately 10 days ago [Claimant] was lifting a granite countertop and he thinks that he overexerted himself and he had sudden sharp shooting pain in his left lower back which radiated down to just below his knee" (Claimant's Exhibit 3, p. 57; Respondents' Exhibit J, p. 112). Claimant testified that the 10-day timeline in Dr. Barton's note was accurate. Dr. Barton noted that Claimant had been seen twice in the emergency room, and that Claimant's pain was not being controlled by medications. Dr. Barton noted that Claimant appeared to be in severe pain and was tearful (Claimant's Exhibit 3, pp. 57-58; Respondents' Exhibit J, pp. 112-113). Dr. Barton noted that Claimant would be consulting with Dr. James Gebhard.

37. An MRI performed at St. Mary's Hospital on September 15, 2014 showed a "[l]arge left disc extrusion causing moderate central canal and left lateral recess stenosis affecting the S1 nerve" (Claimant's Exhibit 2, p. 17; Respondents' Exhibit I, p. 36). Dr. Randall Gehl, the radiologist, noted that Claimant had severe low back pain after lifting a heavy object. Dr. Gehl noted that Claimant was in a lot of pain and had difficulty keeping still (Claimant's Exhibit 2, p. 17).

38. Dr. Gebhard examined the Claimant at St. Mary's Hospital on September 15, 2014 for an orthopedic consult. Dr. Gebhard's note indicates that Claimant was lifting a nearly 1,000-pound slab of granite at work. Dr. Gebhard noted that Claimant "had a clerical worker trying to assist him who was unable to really take much [of] the load. [Claimant] took pretty much the whole load himself and had sudden onset of back pain. Over a short period of time, it started radiating into the left buttock and thigh, occasionally going down below the knee with shooting pain, but the constant pain stays in the buttock and thigh. The back pain itself was also slightly left sided." Dr. Gebhard noted that the September 5, 2015 MRI showed a large disk herniation at L5-S1, displacing the S1 nerve root and that Claimant had "severe symptoms. Dr. Gebhard noted that the Claimant was admitted to the hospital for pain control and for further treatment of his back as the Claimant was unable to function or stand the pain, even with large doses of oxycodone. Dr. Gebhard discussed treatment options with the Claimant and noted that Claimant elected to try epidural injections and further conservative care as opposed to possible microdiskectomy surgery (Claimant's Exhibit 3, pp. 61-63; Respondents' Exhibit J, pp. 116-117).

39. After staying overnight in the hospital, Claimant underwent a left S1 transforaminal epidural steroid injection on September 16, 2014. The Claimant

reported good pain relief after the procedure, bringing his pain level down to 2/10 (Claimant's Exhibit 3, p. 66; Respondents' Exhibit J, p. 121).

40. Claimant also had occupational therapy in the hospital with Callin Portra, OTR, and Jamie Gunnell, PT. The Claimant reported that "he does not have a history of back pain and he has only had sore muscles in his back." The Claimant reported that he planned on returning to work with granite. At this point the Claimant's mobility was limited by pain and he could only tolerate about 20 feet of ambulation. So, he was educated on back exercises and interventions. The Claimant had some pain relief with pelvic tilts and core exercises and they did not increase his back pain. PT Gunnell noted that the Claimant would need outpatient physical therapy for back pain on discharge (Claimant's Exhibit 3, p. 68; Respondents' Exhibit J, p. 123).

41. Claimant was discharged from St. Mary's Hospital at approximately 2:32 p.m. on September 16, 2014 (Claimant's Exhibit 3, p. 64; Respondents' Exhibit J, p. 119).

42. Claimant saw Dr. Gregory Reicks at Foresight Family Physicians on September 18, 2014. Dr. Reicks noted that Claimant had improvement following the epidural steroid injection. Dr. Reicks noted that Claimant was able to cut down on his oxycodone use, and had stopped taking gabapentin. Dr. Reicks reviewed the results of the MRI, and assessed the Claimant with low back pain on left side with sciatica and herniated lumbar intervertbral disc. Dr. Reicks prescribed prednisone and oxycodone. Dr. Reicks referred Claimant to physical therapy and to a spine surgeon. Dr. Reicks also provided work restrictions, including a 10-pound lifting limit, no repetitive bending, no squatting, and no kneeling (Claimant's Exhibit 1, pp. 10-11; Respondents' Exhibit G, pp. 21-22). On the Physician-Employer Communication Form Dr. Reicks checked the box for "yes" that it was medically probable that Claimant's injury was work-related (Claimants' Exhibit 1, p. 12).

43. Claimant returned to Dr. Reicks for follow up on September 29, 2014 reporting that his leg symptoms had worsened since the last visit, and that he had only two or three days of relief after their last visit. Dr. Reicks noted that Claimant had numbness in his left foot and radicular pain in his left buttock and leg. Dr. Reicks noted that Claimant was taking extended release morphine along with oxycodone and gabapentin and so he did not return to work. Dr. Reicks counseled the Claimant about his medications and pain management. Dr. Reicks noted that the Claimant was temporarily disabled from returning to work (Claimant's Exhibit 1, pp. 13-15; Respondents' Exhibit G, pp. 25-26).

44. Dr. Reicks noted on September 29, 2014 that Claimant had an appointment to see a specialist on October 10. Claimant testified that he never consulted with a specialist because Respondents denied his claim and would not authorize any more treatment. Claimant also has not returned to Foresight Family Physicians since September 29, 2014 because Respondents denied authorization for further visits. A telephone memo notes that in a telephone conversation between a staff member of Foresight Family Physicians and a representative for Insurer, Claimant's

physicians were notified by Jennifer Loucks that "this claim is being denied while under investigation." The staff member noted, "they will NOT pay for any visit, therapy OR medications. I have a call in to the patient, but in case they call you first, just wanted you to be aware. His appts. with Dr. Reicks have been cancelled" (Claimant's Exhibit 1, p. 16).

45. Insurer filed a Notice of Contest dated October 1, 2014 (Claimant's Exhibit 7, p. 144; Respondents' Exhibit b, p. 2).

46. Claimant testified that he has not returned to work for Employer since September 8, 2014. Claimant testified that he was not certain whether he was still employed with Employer. He testified that he had not yet been returned to full work duty by a physician.

47. Claimant took another job with StarTek beginning December 8, 2014. He testified that StarTek is an inbound call center for a collection agency, and that his job duties included sitting at a desk taking phone calls, and that there were no lifting or physical job duties. He testified he earned $11 per hour and worked 40 hours per week, which was less than he earned working for Employer. Claimant testified he took the second job because he had not received any wages or benefits from Respondents since September 8, 2014, and needed money to support his family. He testified he had already sold two vehicles for money but still needed to be able to pay his family's rent.

48. Claimant testified that his symptoms had improved since the injury. He testified that at rest, his pain level was a 0 out of 10, but rose to a 4 out of 10 with activity. He testified that he could walk and move around, but had a "huge problem" going up and down stairs or opening doors. Claimant testified that his symptoms since the injury have limited his activities of daily living. He testified that he cannot lift anything, cannot perform yard work, and is less independent than he used to be.

49. Claimant compared his back and leg symptoms before this injury when he saw a chiropractor and after the work injury. He testified that when he sought care with a chiropractor, his symptoms were uncomfortable and irritating, but "light," and the chiropractor could "just stretch him out." He testified that after the September 5, 2014 injury, his symptoms when he was admitted to the hospital required narcotic medications, injections, and physical therapy: much more treatment than was needed when he saw the chiropractor in July and August 2014.

50. The ALJ finds Claimant's testimony regarding his symptoms, the onset of his symptoms, and the reporting of his symptoms to Ms. Hampton to be credible and persuasive.

51. Respondents referred Claimant to Dr. George Schakaraschwili for an independent medical evaluation ("IME") on January 13, 2015. Dr. Schakaraschwili reviewed Claimant's medical records and prepared an extensive summary, obtained a medical history and performed a physical examination in connection with his IME. Dr. Schakaraschwili noted in his report that Claimant explained that the granite slabs are

"supported vertically and manually put [onto] a table for cutting and other finishing." Dr. Schakaraschwili noted that Claimant described that "two coworkers stand on either end of the granite slab and then pivot it so it is horizontal and place it on the table" (Respondents' Exhibit K, p. 132). He noted that on September 5, Tim Mallett ("an inexperienced helper") was assisting Claimant in getting a slab onto a table. He noted that when Claimant said to lift, Mr. Mallett did not lift, and Claimant took most of the weight of the slab. Dr. Schakaraschwili noted that Claimant reported he had immediate back pain in the midline and to the left side. He noted that Claimant might have left work early that day, and was unable to do any work the following day because his back hurt. He noted that Claimant reported his injury to Ms. Hampton the following Monday, that Ms. Hampton called the owner, and that he was told to take the rest of the day off (Respondents' Exhibit K, p. 133). Dr. Schakaraschwili noted that the Claimant told him that Employer "asked [Claimant] to sign papers saying that he was at work Monday and Tuesday although he was not. The Claimant also stated to Dr. Schakaraschwili that Ms. Hampton denied that he reported the injury. He then challenged her regarding the dates that they were asking him to sign on the paperwork and he was told that they were not insured on the date he was injured" (Respondents' Exhibit K, p. 133).

52. Dr. Schakaraschwili reported that after the claim was denied, his PCP provided him with pain medications for awhile but then stopped and the Claimant became depressed and suicidal. The Claimant reported that he stayed in his house and would have to lie on the floor when his back was hurting. The Claimant reported to Dr. Schakaraschwili that by Thanksgiving 2014, Claimant's pain had improved and he was "100% better" (Respondents' Exhibit K, p. 133). Although he reported reduced pain overall, the Claimant reported that "he gets the feeling that his back wants to collapse. He does not feel secure when he goes up stairs. He states his left leg feels weak" (Respondents' Exhibit K, p. 133). Dr. Schakaraschwili also noted that Claimant had pain between a 0 and 3 out of 10 at times, and noted that walking up hills and stairs, getting up off the ground, and lifting all made Claimant's pain worse (Respondents' Exhibit K, p. 133). Dr. Schakaraschwili also noted that Claimant had not returned to his prior activities because of fear that something might happen to his back (Respondents' Exhibits, p. 140).

53. Dr. Schakaraschwili noted that Claimant reported he had always had back problems, which he attributed to being overweight (Respondents' Exhibit K, pp. 132-133). Dr. Schakaraschwili opined that it was "quite possible" that the disc herniation on the September 15, 2014 MRI preexisted the work injury. However, he also noted that without prior lumbar MRI scans, it was "impossible to determine whether the disc herniation reported on the scan of September 15, 2014 was already present on the reported date of injury" (Respondents' Exhibit K, p. 140).

54. Dr. Schakaraschwili did agree that Claimant's symptoms were "suggestive of a disc herniation" or "could also be due to a sacroiliac joint disorder." Although, Dr. Schakaraschwili opined that "[t]here was no evidence that the disc herniation was caused by the incident reported at work." Dr. Schakaraschwili also opined that "lifting and squatting with almost any amount of weight could result in disc herniation" and disc herniation can occur when doing activities that do not involve lifting

(Respondents' Exhibit K, p. 141). Despite Claimant's ongoing symptoms, Dr. Schakaraschwili opined that no permanent exacerbation or injury arose from the work incident. Dr. Schakaraschwili did note that Claimant's low back condition "may have been temporarily exacerbated by events in early September 2014" (Respondents' Exhibit K, p. 140). In his report, when asked whether Claimant's low back condition was the result of a work-related injury, Dr. Schakaraschwili opined: "The work incident could have caused a temporary exacerbation of [Claimant's] preexisting condition" but he further opined that "there is no evidence of any objective worsening of his condition at this point as a result of the work incident as he is essentially pain free at this point (Respondents' Exhibit K, p. 141).

55. Dr. Schakaraschwili testified at hearing in this matter. Dr. Schakaraschwili's testimony was generally consistent with his January 13, 2015 IME report. For the IME, Dr. Schakaraschwili took a detailed medical history and the Claimant reported a long history of back pain to him. The Claimant told Dr. Schakaraschwilli that he had seen a chiropractor. The Claimant told Dr. Schakaraschwilli that sometimes his back pain was due to lifting at work and sometimes lifting outside of work. In comparing the pain diagram the Claimant completed for the chiropractor prior to the work incident, Dr. Schakaraschwili noted that the Claimant had low back pain with pain going down the back of the left leg. He testified that based on his review of the chiropractic notes, Claimant was having range of motion restrictions at that time. Dr. Schakaraschwili also noted a July 25, 2014 chiropractic progress note includes a notation about "sciatica." So, when considering the MRI of the Claimant's lumbar spine, Dr. Schakaraschwili testified that you cannot tell what caused the lumbar "large left disc extrusion" that is noted. Nor can you tell if this is the Claimant's pain generator. In going back to the pain diagram, Dr. Schakaraschwili testified that this could indicate discogenic pain, or, and more likely, this could be coming from the joint, based on the Claimant's response to the injection since he didn't have immediate pain relief.

56. Based on what Dr. Schakaraschwili opines is a diagnostic response (70% relief) on 9/16/14 to a left S1 transforaminal epidural steroid injection, Dr. Schakaraschwilli thought the Claimant's pain more likely from the SI joint and not a herniation. Ultimately, Dr. Schakaraschwilli opines that Claimant had a temporary exacerbation of a pre-existing condition. Claimant has episodes of back pain that go down the leg, but no evidence of structural change. Dr. Schakaraschwili opined that back pain is multifactoral and the Claimant had it most of his life. So, this incident was a temporary exacerbation of a preexisting condition. He finds that Claimant is now at MMI for any temporary exacerbation that may have happened on 9/5/14. The Claimant was at MMI by Thanksgiving when Claimant reported the pain was mostly gone. As for the incident, this is resolved and no additional treatment is required for that injury.

57. On cross-examination, Dr. Schakaraschwilli testified that he would have liked to see a follow up SI joint injection, but that didn't happen in this case. Nevertheless, Dr. Schakaraschwilit finds that the Claimant is back to his baseline – which is not symptom-free. Dr. Schakaraschwili testified that he was aware that Claimant had no prior low back treatment other than the two chiropractic visits, had no

prior back injuries, and that Claimant had no low back MRIs other than the one performed on September 15, 2014, but still opined that Claimant's symptoms following the work incident were attributable to a preexisting condition. When asked whether Claimant's symptoms worsened after the September 5, 2014 work incident, Dr. Schakaraschwili testified that Claimant's symptoms did worsen and required medical treatment. When asked whether a "temporary exacerbation of a preexisting condition" is compensable under Colorado workers' compensation law, Dr. Schakaraschwili testified that he was not qualified to answer a legal question, only medical questions.

58. In considering the conflicting medical opinions regarding the Claimant's condition and existence of a low back injury with an onset of September 5, 2014, the ALJ credits the medical opinions expressed by physicians and providers at St. Mary's Hospital, Dr. Gebhard, Dr. Utt, and Dr. Reicks in the medical records over the contrary opinions expressed by Dr. Schakaraschwili in his IME report and testimony. The ALJ finds that Claimant has proven that it is more likely than not that he suffered an injury arising out of and in the course of his employment with Employer. The ALJ finds Claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credits Claimant's testimony that he injured his low back when he lifted granite while working on September 5, 2014. The ALJ further credits Claimant's testimony that although he had some existing back symptoms that preexisted the date of the injury, the symptoms were not independently disabling and did not require medical treatment before the September 5, 2014 injury occurred. The ALJ finds that Claimant has proven that it is more likely than not that his low back and leg symptoms were aggravated or exacerbated when he lifted granite while working on September 5, 2014, which aggravation required treatment.

59. The ALJ credits the medical opinions expressed by the various medical providers in the records and Claimant's testimony and finds that Claimant has proven that it is more likely than not that the medical treatment he received from St. Mary's Hospital and from Foresight Family Physicians was reasonable and necessary to cure and relieve the Claimant from the effects of his industrial injury. Specifically, the ALJ finds that Claimant sought care with St. Mary's Hospital on September 8, 2014 on an emergent basis for intractable low back pain. The ALJ finds that the office visits with Foresight Family Physicians after the September 5, 2014 injury were reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury, and finds that Foresight Family Physicians was Employer's authorized medical provider.

60. The ALJ further finds that the medical care provided by St. Mary's Hospital on September 10-11, 2014 and September 15-16, 2014 was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. With respect to September 10-11 hospital visit, the ALJ finds that Claimant sought medical care on an emergent basis because his back pain was too severe to wait until his appointment on September 11 with Foresight Family Physician, as noted in the medical records. With respect to the hospital visit on September 15-16, the ALJ finds that Dr. Reicks, Employer's authorized medical provider, referred Claimant to the hospital for an MRI and evaluation for "intractable back pain" on September 15, 2014. The medical

records reflect that Claimant then went directly from Dr. Reicks's office to St. Mary's Hospital.

61. The ALJ finds that the Claimant left work at 2:00 p.m. on Friday, September 5, 2014, but it is uncertain that there was an actual wage loss that day. As for Saturday, September 6, 2014, the Claimant testified that he stopped in but then he and another employee elected to clock out and leave. While this testimony was found to be credible, it was not established that September 6, 2014 was a full work day or how long the Claimant had intended to work that day or that there was an actual wage loss. The Claimant also made plans to hike with his family on that day, even though he did not end up hiking due to back pain.

62. The ALJ finds that Claimant's work injury caused him to be totally temporarily disabled from working beginning September 8, 2014, when he was told to leave work due to back pain, and continuing until December 7, 2014, the day before Claimant began working on a light duty basis for another employer.

63. The ALJ also finds that Claimant's work injury and associated symptoms have limited his capacity to earn his previous wage. He is has not been placed at MMI by and ATP, he is still not cleared to return to work for Employer and was never offered modified duty by Employer. The ALJ credits Claimant's testimony that he returned to work for another employer in a less physical office job, but earned less than he did while working for Employer. At the new employer his average weekly wage is $440.00 (40 hours per week at $11.00 per hour) and per stipulation, his average weekly wage working for Employer was $535.00, for a wage loss of $95.00 per week from December 8, 2014 ongoing.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

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

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

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

With respect to the conflicting testimony of the fact witnesses on the Claimant's mechanism of injury, the ALJ found the Claimant's testimony to be credible and further found that the testimony of both Tim and Larry Mallett supports Claimant's testimony that Tim Mallett was not familiar with the way Claimant lifted slabs of granite, and supported Claimant's testimony that Tim Mallett did properly not help Claimant lift the slab. This finding, coupled with the Claimant's overall credible testimony, and the consistency of the Claimant's symptoms and reporting in the medical records, makes it more likely than not that the Claimant did experience an injury while placing a piece of granite on the saw table with the assistance of Tim Mallett on September 5, 2014.

Then, in considering the conflicting medical opinions regarding the Claimant's condition and existence of a low back injury with an onset of September 5, 2014, the ALJ credits the medical opinions expressed by physicians and providers at St. Mary's Hospital, Dr. Gebhard, Dr. Utt, and Dr. Reicks in the medical records over the contrary opinions expressed by Dr. Schakaraschwili in his IME report and testimony. The ALJ found that Claimant has proven that it is more likely than not that he suffered an injury arising out of and in the course of his employment with Employer. The ALJ found Claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credited Claimant's testimony that he injured his low back when he lifted granite while working on September 5, 2014 and has proven that it is more likely than not that his low back and leg symptoms were caused, aggravated or accelerated when he lifted granite while working on September 5, 2014. The ALJ further credited Claimant's testimony that, although he had some existing back symptoms that preexisted the date of the injury, the symptoms were not independently disabling and did not require medical treatment before the September 5, 2014 injury occurred.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on September 5, 2014 caused or permanently aggravated, accelerated or combined with his preexisting low back condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on September 5, 2014.

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 musty establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Per C.R.S. § 8-43-404 (9)(a), health care services shall be deemed authorized if the claim is found to be compensable when:

- Compensability of a claim is initially denied

- The services of the physician selected by the employer are not tendered at the time of the injury; and

- The injured worker is treated….at a public health facility in the state (or within 150 miles of the residence of the injured worker).

If the treatment provided to a claimant is found to be reasonably necessary and related to the injury, the claimant shall not be liable for treatment by the provider where the conditions of C.R.S. § 8-43-404 (9) are met.

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

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).

As found, the medical opinions expressed by the various medical providers in the records and Claimant's testimony established that it is more likely than not that the medical treatment he received from St. Mary's Hospital and from Foresight Family Physicians was reasonable and necessary to cure and relieve the Claimant from the effects of his industrial injury. Specifically, the ALJ finds that Claimant sought care with St. Mary's Hospital on September 8, 2014 on an emergent basis for intractable low back pain.

The ALJ further found that the office visits with Foresight Family Physicians after the September 5, 2014 injury and the conservative care provided was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury, and finds that Foresight Family Physicians was Claimant's authorized medical provider.

The ALJ also found that the medical care provided by St. Mary's Hospital on September 10-11, 2014 and September 15-16, 2014 was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. With respect to September 10-11 hospital visit, the ALJ finds that Claimant sought medical care on an emergent basis because his back pain was too severe to wait until his appointment on September 11 with Foresight Family Physician, as noted in the medical records. With respect to the hospital visit on September 15-16, the ALJ finds that Dr. Reicks, Employer's authorized medical provider, referred Claimant to the hospital for an MRI and evaluation for "intractable back pain" on September 15, 2014. The medical records reflect that Claimant then went directly from Dr. Reicks's office to St. Mary's Hospital.

Prior to September 5, 2014, Claimant had not been on medical restrictions, nor had the Claimant missed work due to low back problems. The conservative medical care that the Claimant received to date from Foresight Family Physicians and St. Mary's Hospital and all their referrals was reasonably necessary to treat the Claimant's work-related condition. The Claimant's authorized treating physicians have never placed the Claimant at MMI nor released him to return to work without restrictions. The Claimant has reported that his pain is significantly reduced, but still credibly reports some ongoing symptoms and/or reduced function in terms of his activities of daily living. The Claimant has established that he is entitled to further evaluation of his lower back 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.

Temporary Disability Benefits

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); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2)

Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

In the case of temporary partial disability (TPD) benefits, the disability benefit is calculated on the "difference between the employer's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability…." Per § 8-42-106(2)(a)-(b), TPD benefits shall continue until the first occurrence of either one of the following:

- the employee reaches maximum medical improvement; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment

An authorized treating physician must make the determination of when the injured employee reaches maximum medical improvement (per § 8-42-107(8)(b)(I), C.R.S.), unless an ATP has not determined an employee is at MMI and an employer or insurer requests selection of an independent medical examiner after all of the following conditions are met: 24 months have passed since the date of injury, a party requests in writing that an ATP determine whether the employee has reached MMI, the ATP has not determined the employee reached MMI, and a physician other than the ATP has determined the employee has reached MMI. § 8-42-107(8)(b)(II)(A)-(D), C.R.S.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Here, it is not entirely clear that the Claimant suffered a wage loss on September 5, 2014 or September 6, 2014. While he may have left slightly early on Friday, the 5th, it is not clear there was a wage loss. Then, Saturday, the 6th, was not a typical work day and the testimony was that sometimes employees would work on Saturdays if there was extra work or to catch up on things. It is not clear how long the Claimant may have worked on Saturday or how long he had expected to work or that he suffered a wage loss for that day.

The Claimant came in to work on Monday, September 8, 2014, but after reporting his back pain and work injury to Ms. Hampton, the Claimant was told to leave work. From this point forward, the Claimant was not permitted to return to work due to back pain that was found to be work-related. Late in the evening of September 8, 2014, the Claimant's back pain was so severe, he sought treatment at the Emergency Department and was discharged in the very early hours of September 9, 2014. Then, again on September 10, 2014, the Claimant's back pain was severe enough for him to return to the Emergency Department for further medical treatment and he was discharged in the early hours of September 11, 2014. Later that day, the Claimant sought medical treatment with James Haraway, NP at Foresight Family Physicians.

On the morning of September 12, 2014, Ms. Hampton visited Claimant at his home because he could not come in to work due to pain in order to fill out worker's compensation claim paperwork. Then, Claimant saw Dr. Dale Utt for an initial evaluation on September 12, 2014. On September 12, 2014, Dr. Utt noted the Claimant was temporarily unable to work and he listed the Claimant's work status as unable to work from 9/12/14 to 9/18/14.

Claimant returned to see Dr. Utt on September 15, 2014 and Dr. Utt noted that Claimant had "intractable back pain" and, because the oral pain medications were not managing his intense pain, the Claimant needed to be admitted to the hospital and have a diagnostic MRI. Claimant returned to St. Mary's Hospital the same day he saw Dr. Utt on September 15, 2014 and he was admitted into the hospital. After staying overnight in the hospital, Claimant underwent a left S1 transforaminal epidural steroid injection on September 16, 2014. Claimant was discharged from St. Mary's Hospital at approximately 2:32 p.m. on September 16, 2014. Claimant saw Dr. Gregory Reicks at Foresight Family Physicians on September 18, 2014. Dr. Reicks also provided work restrictions, including a 10-pound lifting limit, no repetitive bending, no squatting, and no kneeling. It was established that the Claimant's wife provided these restrictions to Employer, but Claimant was not offered modified duty within his restrictions. At a follow up visit with Dr. Reicks on September 29, 2014, Dr. Reicks noted that the Claimant was temporarily disabled from returning to work. Dr. Reicks noted on September 29, 2014 that Claimant had an appointment to see a specialist on October 10. Claimant testified that he never consulted with a specialist because Respondents denied his claim and would not authorize any more treatment. Claimant also has not returned to Foresight Family Physicians since September 29, 2014 because Respondents denied authorization for further visits. Insurer filed a Notice of Contest dated October 1, 2014. Claimant testified that he has not returned to work for Employer since September 8, 2014 and he testified that he had not yet been returned to full work duty by a physician.

Claimant took another job with StarTek beginning December 8, 2014. He testified that StarTek is an inbound call center for a collection agency, and that his job duties included sitting at a desk taking phone calls, and that there were no lifting or physical job duties. He testified he earned $11 per hour and worked 40 hours per week, which was less than he earned working for Employer. Claimant testified he took the second job because he had not received any wages or benefits from Respondents since September 8, 2014.

The Claimant's work-related disability has resulted in him missing more than 3 work shifts and he has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits from the day he last worked until he returned to modified employment. The last day that the Claimant worked for Employer was September 8, 2014. So, the Claimant is entitled to TTD benefits from September 9, 2014 until December 7, 2014 (the day before he started working at StarTek on December 8, 2014).

While Dr. Schakaraschwili has opined the Claimant is at MMI, the Claimant has not been put at maximum medical improvement by authorized treating physician nor have the conditions of § 8-42-107(8)(b)(II)(A)-(D), C.R.S. been met. In addition, the Claimant's attending physician had not given him a written release to return to modified employment, with such employment having been offered to the employee in writing, and then employee failed to begin such employment. Therefore, the Claimant is entitled to TPD benefits from December 8, 2014 ongoing until one of the conditions of § 8-42-106(2)(a)-(b) has occurred.

ORDER

It is therefore ordered that:

1. Claimant proved that he suffered a compensable work injury on September 5, 2014.

2. Medical treatment provided by Foresight Family Physicians and St. Mary's Hospital was reasonably necessary to cure and relieve Claimant from the effects of his September 5, 2014 injury and Respondents shall be liable for payment for this medical treatment.

3. The Claimant is entitled to further medical benefits to treat his low back and associated symptoms which are causally related to the September 5, 2014 work injury, if any, as determined by his authorized treating physicians, and the Respondents are responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

4. Claimant's AWW is established to be $535.00 per stipulation of the parties approved by the ALJ.

5. Respondents shall pay Claimant temporary total disability benefits for the period of September 9, 2014 through December 7, 2014.

6. Respondents shall pay Claimant temporary disability benefits for the period beginning December 8, 2014 ongoing until terminated by statute based on a $535.00 AWW, reduced by a $440.00 weekly wage the Claimant earned at a light duty office job for another employer, resulting in an average weekly wage loss of $95.00 and a corresponding temporary partial disability rate of $63.33 per week.

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

8. 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: September 3, 2015

Kimberly A. Allegretti
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 she sustained a compensable injury arising out of and in the course of his employment with employer?

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

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits beginning October 18, 2014 and continuing?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to reimbursement of the cost of medical benefits pursuant to Section 8-42-101(6)?

- The parties stipulated that if the claim is compensable, the claimant's average weekly wage ("AWW") is $782.27.

FINDINGS OF FACT

1. Claimant was employed by employer as a driver hauling mail between Salida, Colorado and Gunnison, Colorado. Claimant testified the on Friday October 17, 2014 he was pulling an over the road container made of aluminum and filled with mail that weighed approximately 500 pounds when he got pinned between the container and another over the road container. Claimant testified he was struck in the middle of the back by a part on the container when he was pinned. Claimant testified he parked his mail truck and got into his personal vehicle to drive home and knew that something was not right as his legs felt like rubber.

2. Claimant works the overnight shift for employer, which required him to go to work in the afternoon of October 16, 2014 and return home early in the morning on October 17, 2014.

3. Claimant testified he drove home and called his supervisors to call in sick for his next shift before going to bed. Claimant testified he was subsequently unable to get into a car because of his symptoms and his wife had to call an ambulance to take him to the hospital.

4. Claimant's wife testified that when claimant left for work on October 16, 2014 he was not complaining of back symptoms. When she saw claimant at approximately 6:30 a.m. on October 17, 2014 claimant told her his back hurt. Claimant's wife testified claimant went to lie down on the couch and later got up to use the restroom and told her his legs felt like rubber. Claimant then went to bed, and when he tried to get up, he couldn't walk. Claimant's wife then called an ambulance for him.

5. Claimant was taken by ambulance to Montrose Memorial Hospital emergency room ("ER") on October 18, 2014 where he was admitted. Claimant underwent a MRI of the thoracic spine on October 19, 2015 as ordered by Dr. Lokey. The MRI showed high florid signal at T10 and T11 vertebral bodies with destructive endplate changes. Based on the results of the MRI, claimant was diagnosed with discitis and was transferred to St. Mary's Hospital for further treatment.

6. Claimant came under the care of Dr. Clifford at St. Mary's Hospital. Dr. Clifford noted claimant's accident history of being a postal worker who was moving a cart of mail when he felt a pop in his back followed by severe pain on Saturday morning resulting in claimant being taken to the hospital. Dr. Clifford diagnosed possible discitis as noted on the thoracic MRI and recommended surgery.

7. Dr. Clifford ultimately performed a T10-T11 posterior spinal fusion, posterior laminectomy and T10-T11 posterior segmental instrumentation pedicle screws. Claimant was subsequently transferred following the surgery to a rehabilitation center in Montrose. During rehab, claimant suffered a blockage of his large intestine that required a laparotomy performed by Dr. Jay on November 8, 2014.

8. Dr. Clifford testified at hearing in this matter. Dr. Clifford testified he treats 5-7 cases of discitis per year and classified the condition as very serious. Dr. Clifford testified discitis is an infection that causes instability of the spine resulting in the need for surgical intervention and fusion of the spine.

9. Dr. Clifford testified he first treated claimant in the present case in October 2014. Dr. Clifford testified he could not indicate how long claimant's infection was present prior to the surgery. Dr. Clifford testified that the MRI of the thoracic spine showed destructive changes at the end plates which demonstrated that the infection had been present for more than 24 hours. Dr. Clifford testified that claimant's infection could have been present, but asymptomatic for weeks or months.

10. Dr. Clifford testified that if there is an injury and the infection is already in the blood stream, the infection wouldn't advance quicker, but the symptoms could be increased. Dr. Clifford testified that it was his opinion in claimant's case that the injury at work accelerated claimant's symptoms. Dr. Clifford testified this was his opinion because claimant was not symptomatic before the injury.

11. Dr. Clifford testified that the infection is not affected by an outside source, but claimant's symptoms could become more severe and accelerate the need for

surgery. Dr. Clifford testified, however, that he has no way to determine if claimant's condition would have worsened at the same rate without the injury.

12. Dr. Clifford opined that claimant had a bladder infection at the time of the surgery and this bladder infection was the likely source of claimant's spine infection.

13. Respondents referred claimant for an independent medical examination ("IME") with Dr. Rauzzino on June 22, 2015. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history and performed a physical evaluation in connection with his IME. Dr. Rauzzino issued a report following his IME that reflected his opinion that claimant's discitis was not caused or accelerated by claimant's injury. Dr. Rauzzino opined that claimant's infection occurred independent of his employment and was not related to trauma.

14. Dr. Rauzzino testified consistent with his report. Specifically, Dr. Rauzzino noted that claimant reported to him that when he was initially pinned between the carts he did not feel any terrible pain, but did feel a little bit of pain. Dr. Rauzzino testified, however, that the act of getting pinned between the carts did not cause, aggravate or accelerate claimant's discitis. Dr. Rauzzino testified that after claimant was pinned between the carts, he continued to be able to finish his work shift and went home. While at home, claimant developed the significant symptoms related to the discitis. Dr. Rauzzino testified the incident did not affect the onset of his symptoms and the traumatic event at work was incidental to the progression of those symptoms.

15. The ALJ credits the opinions expressed in Dr. Rauzzino's report and testimony and determines that claimant has failed to prove that it is more probable than not that he sustained a compensable injury arising out of and in the course of his employment with employer.

16. The ALJ notes that the opinions expressed by Dr. Clifford in his testimony rely heavily on the temporal relationship of claimant's symptoms to his work. Dr. Clifford appears, through his testimony, to agree that the discitis was not caused by the incident at work on October 17, 2014. Instead, Dr. Clifford testified it was his opinion that the incident increased claimant's symptoms and resulted in the need for treatment.

17. However, the ALJ does not find that the presence of that temporal relationship results in a finding that the incident at work on October 17, 2014 aggravated, accelerated or combined with claimant's pre-existing condition to cause the disability or need for medical treatment.

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 failed to demonstrate by a preponderance of the evidence that his discitis was caused, aggravated, accelerated or that the incident of October 17, 2014 combined with his pre-existing bladder infection to produce the disability or need for treatment. As found, the ALJ credits the opinions expressed by Dr. Rauzzino in his report and testimony to support this finding.

ORDER

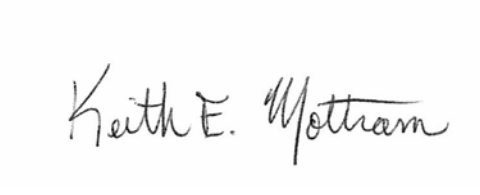
It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

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

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

DATED: September 21, 2015



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right shoulder and neck arising out of and in the course of her employment with Employer on October 12, 2014.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 29, 2014 and continuing until terminated by law.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to continued reasonable and necessary medical treatment and whether the treatment received so far has been authorized.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant should be subject to penalties for failing to timely report her injury pursuant to §8-43-102(1)(a), C.R.S.

PROCEDURAL

At the outset of hearing Respondents requested that any medical benefits awarded be paid in accordance with the medical fee schedule. The parties agreed that the issues of average weekly wage, applicable offsets, overpayments, and credits would be reserved for future determination.

FINDINGS OF FACT

1. Claimant has worked for Employer as the fuel center manager since September 11, 2001.

2. The fuel center is separate from Employer's main grocery store on the opposite side of Employer's parking lot. Claimant works inside a kiosk. Claimant's job duties include assisting customers with purchasing gasoline and other items for sale in the kiosk including snacks, drinks, and lottery tickets. Claimant regularly has to lift, carry, and reach overhead with her right arm. Claimant uses her right arm to key purchases into the computer system.

3. As a manager, Claimant is familiar with Employer's rules and procedures concerning the requirements to report a work injury in writing. The requirement to report a work injury in writing within four days is posted in Employer's break room as well as in the fuel station kiosk where Claimant works.

4. On October 12, 2014 Claimant was so employed. Claimant received a phone call from a co-worker inside the main store asking Claimant to check on a "regular" customer named Judy who had phoned in needing help because she had fallen off her scooter.

5. Judy was described by multiple employees as an older, heavy-set woman who rides her scooter to Employer's store daily. Judy was described by several employees as being "not all there mentally."

6. Claimant left the fuel kiosk at approximately 9:44 a.m. Claimant walked to an area off Employer's premises. Claimant found Judy and attempted to help Judy back onto the scooter. Judy grabbed Claimant's right hand, and pulled hard to try to get back up. Claimant was unable to lift Judy up but helped Judy crawl back onto the scooter.

7. At 9:48 a.m. Claimant returned to the fuel kiosk and continued with her regular work duties.

8. Claimant worked the remainder of the day in the fuel kiosk and performed her regular duties. Claimant is seen in video surveillance working in and around the fuel center kiosk, reaching overhead with her right arm, using her right arm to handle money and type on the cash register, bending over, carrying items with her right arm, reaching with her right arm, holding the telephone with her right hand, and cradling the telephone between her neck and right shoulder. Claimant's movements the remainder of her shift on October 12, 2014 are unrestricted and she repeatedly used her right arm overhead and to perform her duties. *See* Exhibit L.

9. Claimant did not verbally report that she had suffered an injury attempting to help Judy to anyone on October 12, 2014. Claimant's testimony that she reported an injury to assistant store manager Rick Fender and to customs relations managers Patty Hutson and Connie Herrera on October 12, 2014 is not credible. Mr. Fender testified she did not report an injury, Ms. Hutson testified that she did not report an injury, and Ms. Herrera was not at work that day.

10. Claimant continued to work her regular schedule and regular duties as fuel center manage with no restrictions until October 30, 2014. Either the store's manager, assistant manager, or manager-in-training performed daily inspections of the fuel center credit card machines for skimming devices and would see Claimant in the morning while performing the inspections. Claimant did not report to any of them that she had suffered a right shoulder or neck injury attempting to help Judy and none of the managers observed Claimant to display any physical difficulties performing her job duties from October 12, 2014 through October 30, 2014.

11. On October 25, 2014 Claimant first mentioned the incident with Judy to store manager Ed Abila. Mr. Abila did not believe Claimant was reporting a work injury,

believed it was a personal situation that had occurred off store property, and referred Claimant to assistant manager Mr. Fender.

12. On October 27, 2014 Claimant advised Mr. Fender of the incident with Judy and reported it as a work injury. Claimant then met with Mr. Fender and manager-in-training Mark Friend on October 30, 2014.

13. On October 30, 2014, with the assistance of Mr. Fender, Claimant filled out and signed an Associate Work Related Injury Report. *See* Exhibit I.

14. Claimant reported that on October 12, 2014 she was asked to check on Judy. Claimant reported she found Judy and told Judy to grab the bench and that she couldn't pick Judy up. Claimant reported Judy said "don't leave me" and grabbed her right arm pulling her down and that she fell over the top of Judy on the ground and that her arm immediately started hurting. *See* Exhibit I.

15. On October 30, 3014 Mr. Fender and Mr. Friend filled out an Associate Incident In-Store Investigation Report and an Employee Incident Questionable Claim form. They reported that notification occurred on October 25, 2014 and that Claimant reported lifting a customer who had fallen off of Employer's property when Claimant felt a sharp pain in her arm and that she fell onto the customer. It was circled "yes" that they questioned the validity of the claim. It was circled "yes" that Claimant had medical treatment before reporting the injury. *See* Exhibit I.

16. On the Questionable Claim form, Mr. Fender noted that he believed the claim was questionable. He reported that he was not notified by Claimant that she had been hurt until October 27, 2014. He did not recall Claimant's assertion that she had reported the injury to him and to a group of employees in the break room on October 12, 2014. He noted Claimant's assertion that she had also reported the injury to Patty on October 12, 2014 and noted Patty denied being notified. He noted that Claimant had already gone to a doctor and had an MRI performed. *See* Exhibit I.

17. On November 5, 2014 Judy filled out a statement. The statement indicates that Judy lost her balance due to the wind and fell. She called the police who were too busy to help and then called City Market. Claimant then came out of the gas station and grabbed both of Judy's hands, pulled, and almost fell but never went to the ground. Judy then crawled to her 4-wheeler to pull herself up to the seat and asked Claimant to hold the 4-wheeler. *See* Exhibit I.

18. After Claimant reported the injury and filled out the report, Employer referred her for medical treatment with their authorized providers.

Medical treatment prior to October 12, 2014

19. Prior to her alleged October 12, 2014 work injury, Claimant underwent treatment for the same body parts she alleges were injured assisting Judy.

20. On November 17, 2004 it was noted that Claimant was evaluated for, amongst other things, a right shoulder problem. *See* Exhibit 2.

21. On October 7, 2009 Claimant underwent a MRI of her cervical spine that was interpreted by Robert Heasty, M.D. Dr. Heasty noted that Claimant had below average sagittal diameter of the central canal and that she had a low-grade disc protrusion and degenerative changes at the C5 level producing low grade central stenosis. *See* Exhibit B.

22. October 21, 2009 Claimant was evaluated by Neal Gilman, M.D. Claimant reported to Dr. Gillman that she had pain in her right arm for the past two years. Claimant had difficulty describing where the pain was located but noted her right wrist, lateral aspect of her right elbow, and indicated that when she used her right arm the pain radiated up into her shoulder and possibly into the right side of her neck. Claimant reported occasional tingling and numbness in her right arm. Dr. Gillman noted that Dr. Pulsipher had in the past injected Claimant's right shoulder and right elbow but that the injections did not alleviate Claimant's symptoms. Dr. Gillman noted that Claimant's MRI scan of October 7, 2009 showed mild vertical stenosis, particularly at the C4-5 level with a posterior central disc protrusion and some mild hypertrophic spurring. *See* Exhibit C.

23. On October 21, 2009 Dr. Gillman performed an EMG of Claimant's neck and right upper extremity that was normal. *See* Exhibit C.

24. On June 15, 2011 Claimant was evaluated by Dr. Gillman. Dr. Gillman noted he previously saw Claimant in October of 2009. Claimant reported to Dr. Gillman that since being evaluated in 2009, she continued to have the same symptoms mainly that of shoulder and right arm pain. Claimant reported that she continued to have right sided neck pain and that her entire right arm at times was achy and that she had intermittent tingling and numbness in her right arm and in the digits of her right hand. *See* Exhibit C.

25. On June 15, 2011 Dr. Gillman performed EMG testing of Claimant's right arm and right leg. His findings were normal. Dr. Gillman opined that Claimant had non-physiological sensory loss in her right arm and right leg and questioned the validity of her underlying sensory symptoms. *See* Exhibit C.

26. On June 16, 2011 Claimant underwent an MRI of her cervical spine that was interpreted by Charles Fowler, M. D. Dr. Fowler noted Claimant had slight central anterior extradural defect at C5-C6 with mild flattening of the thecal sac but no overt stenosis and that the remainder of the cervical spine was unremarkable. Dr. Fowler opined that similar findings were noted on the prior exam. *See* Exhibit B.

27. On July 11, 2011 Claimant was evaluated by Joseph Maruca, M.D. Claimant reported numbness in her right arm and Dr. Maruca opined this was due to a C5-C6 disc. *See* Exhibit E.

28. On August 15, 2011 Claimant was evaluated by Terri Wischhoeffer, PA-C. PA Wischhoeffer noted Claimant had neck and right arm pain since 2009 that was primarily in the posterior neck and right shoulder blade area, and was a constant but variable pain up to 4-5/10 in intensity. Claimant reported the pain radiated down through the arm as far as the hand with numbness in the fourth and fifth fingers of the right hand. Claimant reported two or three motor vehicle accidents over the last few years, one of which preceded the onset of her back and neck problems. PA Wischhoeffer noted that an MRI of Claimant's cervical spine showed multi level cervical spondylosis with a broad based right side eccentric disc bulge at C5-6 causing effacement of the spinal cord and mild to moderate stenosis of her foramina on the right side. PA Wischhoeffer noted Claimant's C6 radiculopathy, and cervical spondylosis with herniated disc at C6-6. Claimant also presented with and an MRI confirmed problems in her lumbar spine and PA Wischhoeffer opined that given Claimant's symptoms, the lumbar spine should be addressed first but that they might consider a C5-6 anterior cervical discectomy and fusion for the herniated disc at C5-6. *See* Exhibit F.

29. On September 4, 2011 Claimant was evaluated at Delta County Memorial Hospital Emergency Department by Jennifer Craig, M.D. Dr. Craig noted Claimant was the victim of a serious assault with her major injury being to her neck from blunt trauma and trouble with swelling. Dr. Craig noted Claimant's report of right shoulder pain, some trouble with swelling, and that on CT scan there was evidence of right vocal cord paresis. *See* Exhibit D.

30. Claimant was also evaluated at Delta County Memorial Hospital Emergency Department by Stephen Adams, M.D. Dr. Adams noted Claimant had decreased strength in her upper extremities, right greater than left, and that Claimant reported tingling down her right arm. *See* Exhibit D.

31. On November 5, 2012 Claimant was evaluated by Dr. Paulsipher. Dr. Paulsipher noted Claimant's pain in the head/neck area and objectively that she had spasm and somatic lesions in the neck. Dr. Paulsipher assessed stress myalgias in the neck and manipulated Claimant's cervical and thoracic spine with excellent results. *See* Exhibit G.

32. On October 29, 2013 Claimant was evaluated by Dr. Paulsipher. Claimant reported pain in her right shoulder that hurt when she lifted overhead, that she couldn't open jars, and that she couldn't put any tension on her shoulder. Dr. Paulsipher noted her history of right shoulder pain that was diffuse, aggravated by sleeping on the right shoulder, lifting her arm overhead, or making a throwing motion. Dr. Paulsipher noted Claimant's range of motion was poor due to the pain in her right shoulder. He assessed shoulder pain due to biceps tendinitis and rotator cuff tendinitis, and injected her right shoulder, noting she had excellent relief from the injection. *See* Exhibit G.

33. On March 27, 2014 Claimant was evaluated by Dr. Paulsipher. He noted she was there for follow up of her right shoulder pain and that her status was worse for more than 6 months. Claimant reported aggravation of her right shoulder pain with lifting and movement, decreased range of motion, and sharp, shooting, achy pain. Claimant reported it was tough to do her hair to her right shoulder pain. Dr. Paulsipher assessed right rotator cuff tendonitis and adhesive capsulitis, and injected her right shoulder. *See* Exhibit G.

34. On May 28, 2014 Claimant was evaluated by NP-C Julie Fournier. NP Fournier noted Claimant had significant enlarged muscle spasm in both shoulders and very tight and hard supraspinatus muscle and trapezius. *See* Exhibit G.

Medical treatment after October 12, 2014

35. On October 21, 2014 Claimant was evaluated by Mary Mebane, M.D. Claimant reported two weeks of upper respiratory symptoms. Claimant did not report any recent injury to her right shoulder or neck. *See* Exhibit G.

36. On October 24, 2014 Claimant was evaluated by Dr. Pulsipher. He noted that Claimant had returned for follow up of her right shoulder pain and that her status was worse with diffuse location. He noted that her right shoulder continued to be aggravated by lifting, movement, or sleeping on it. He noted the shoulder inspection revealed no swelling, ecchymosis, erythema, or step off deformity. He diagnosed right shoulder rotator cuff injury, subsequent encounter. He performed a right shoulder steroid injection. Claimant did not report to Dr. Paulsipher that she suffered an acute injury or acute aggravation to her right shoulder twelve days prior due to an incident with Judy. Rather, she reported *continued* pain and he documented she was there for follow up of her diffuse right shoulder pain. *See* Exhibit G.

37. On October 28, 2014 Claimant underwent an MRI of her right shoulder interpreted by Connie Beneteau, M.D. The MRI revealed tendinosis supraspinatous tendon without definitive tear, and degenerative signal superior labrum. *See* Exhibit 1.

38. On November 5, 2014 Claimant was evaluated by Terry Wade, D.O. Claimant reported right shoulder pain for the past month or so. Claimant reported that she was unable to move her shoulder much at all over the past month. Claimant denied having any previous injury to her right shoulder. Claimant was advised to start moving her shoulder to avoid getting frozen shoulder. *See* Exhibit 5.

39. On November 19, 2014 Claimant was evaluated by Dr. Wade. Claimant reported she still could not move her arm or shoulder very well.

40. On November 25, 2014 Claimant was evaluated by Douglas Huene, M.D. Claimant reported problems with her right shoulder since a work incident. Claimant reported diffuse neck pain, upper back pain, pain down into her arms to her hand, and diffuse numbness about her right arm. Dr. Huene noted that Claimant had decreased

sensation about the right arm diffusely up to the shoulder and involving the entire arm. He noted that right shoulder x-rays showed some AC arthritis and a Type II acromion. He noted that cervical spine x-rays showed mild facet arthritis. He assessed diffuse pain, right shoulder pain due to impingement syndrome, acromioclavicular inflammation with rotator cuff tendonitis, and right arm radiculopathy. *See* Exhibit 1.

41. On December 10, 2014 Claimant attended physical therapy. Claimant reported right shoulder and neck pain. Claimant reported that her right shoulder had hurt before the work incident, but that she had been taking Aleve to control the pain.

42. On December 24, 2014 Claimant underwent an MRI of her cervical spine interpreted by John Kim, M.D. Dr. Kim noted Claimant's history of neck pain and right arm radiculopathy. His impression was broad-based posterior central disc protrusion at C5-C6 with no cord compression and no other disc protrusions. *See* Exhibit 7.

43. On December 31, 2014 Claimant was evaluated by Dr. Huene. Claimant reported continued pain and that she now had diffuse numbness in the hand involving the ulnar 2 fingers and pain lifting over her head. Claimant reported that when she moves her neck she gets a pop and then her right arm goes numb. Dr. Huene discussed treatment options with Claimant at length and Claimant decided to have another steroid injection. Dr. Huene performed the steroid injection into the right AC joint and subacromial space and noted that after injection, her shoulder pain was improved.

44. On January 30, 2015 Claimant was evaluated by Dr. Huene. Claimant continued to have right shoulder pain that she reported was getting worse all the time. Claimant reported the prior injection helped some, but that she still had arm pain.

45. On February 27, 2015 Claimant was evaluated by Dr. Huene. Claimant continued to have right shoulder pain, diffuse neck pain, and diffuse upper back pain that traveled down into her arms to her hand. Claimant continued to have diffuse numbness about the right arm and right hand. Dr. Huene noted that Claimant wanted to undergo shoulder surgery. Dr. Huene advised Claimant that shoulder surgery would definitely not fix her right hand numbness and that the shoulder pain could be referred pain from the cervical spine. Dr. Huene advised Claimant that shoulder surgery may not take care of her symptoms. Dr. Huene performed another steroid injection in Claimant's right shoulder and she reported improved pain levels following the injection.

46. On March 12, 2015 Claimant underwent an Independent Medical Examination performed by Henry Roth, M.D. Claimant initially denied right shoulder problems that existed prior to her alleged work injury. Dr. Roth brought to her attention the prior right shoulder records including injection in March of 2014. Claimant reported the discomfort at her right shoulder was just a normal aching pain at that time. Claimant reported the incident at work caused her immediate discomfort at the shoulder and upper back that continued as the day progressed. She reported that she continued working and performed most of her duties with her left hand. Dr. Roth opined that

Claimant did not have an injury related condition and had no clinical residual as the result of the event she described occurred on October 12, 2014. Dr. Roth opined that there were no new physical findings and no new diagnostic abnormality and only pre-existing degenerative changes at both the shoulder and the neck. Dr. Roth opined that Claimant's current condition was not trauma related and that the MRI did not support an anatomic disruption of the right shoulder that occurred October 12, 2014. Dr. Roth noted that Claimant's report of symptom status that developed and progressed in October of 2014 is distinctly different from her subjective experience prior to October 12, 2014. He noted Claimant's incorrect report of her past medical history. Dr. Roth assessed Claimant with adhesive capsulitis of the right shoulder and degenerative cervical spine condition and concluded that both the right shoulder and neck conditions were not caused or aggravated by the October 12, 2014 incident. *See* Exhibit A.

47. On March 25, 2015 Claimant was evaluated by Mitchell Burnbaum, M.D. Claimant reported pain in her right shoulder, with occasional soreness in the dorsal right forearm but no radicular pain in her right arm. Claimant reported that her middle, ring, and small finger tingle most of the time. Claimant reported that she had not had any trouble with her right arm before, she reported no prior tingling, and no prior significant arm pain. However, Dr. Burnbaum noted in his report that Claimant had been seen for electrodiagnostic studies for right arm pain in 2011 and was seen in 2009 and that it had been noted between 2009 and 2011 that Claimant had continued symptoms of shoulder pain and right arm pain, elbow pain, tingling and numbness in the arm, especially the middle finger and ring finger. Dr. Burnbaum performed nerve conduction studies that were normal. He perf0ormed EMG testing and could not find a clear abnormality. Dr. Burnbaum noted that it was an interesting situation as Claimant displayed symptom magnification on neurologic exam, especially with muscle testing, and that she reported never having problems before the recent work mishap when in fact Claimant has had similar problems dating back to at least 2009. *See* Exhibit 3.

48. On May 4, 2015 Dr. Roth provided an updated report. Dr. Roth specifically noted he did not agree with Dr. Huene's recommendation for surgery. He opined that the surgery would not likely benefit Claimant, that her MRI revealed no trauma related pathology, and that there were only mild degenerative changes to which her clinical presentation did not conform. He opined that the surgery would only make Claimant's circumstances worse and would not benefit if her symptoms were due to cervical radiculopathy. *See* Exhibit A.

Testimony

49. Dr. Roth testified at hearing consistent with his reports. He noted that the imaging studies of Claimant's right shoulder and cervical spine did not show any evidence of an acute injury or trauma. He noted that Claimant had not been candid with him and with other providers when she reported no prior medical history of right shoulder and neck problems when the medical history suggested otherwise. He noted that even after he confronted Claimant with her prior medical history at the independent

medical examination he performed on March 12, 2015, Claimant still denied any prior history to Dr. Burnbaum at an appointment March 25, 2015.

50. Dr. Wade testified at hearing. Dr. Wade agreed that if Claimant delayed in reporting her October 12, 2014 work injury and if she failed to accurately provide her prior medical history, it would call into question whether or not her right shoulder condition was work related. He noted that Claimant advised him at the November 5, 2014 appointment that she was unable to move her right arm and shoulder since the October 12, 2014 work incident. He agreed that if Claimant was seen on video immediately following the incident moving her right arm and shoulder in a variety of activities, it would be inconsistent with Claimant's reports to him and also would cause him to question whether a work related injury occurred that day. Dr. Wade also agreed that the right shoulder MRI did not indicate an acute tear or injury, but was more representative of a degenerative, age-related condition.

51. Dr. Roth is found credible and persuasive. His opinions take into account Claimant's entire past medical history which she failed to report to multiple providers. His opinions are consistent with diagnostic imaging and with Claimant's symptoms prior to the alleged work incident on October 12, 2014 which remain very similar to her symptoms after the alleged work incident.

52. The opinion of Dr. Wade is not as credible or persuasive. Dr. Wade's opinion was based upon Claimant's subjective reports to him. Her subjective reports were not accurate. Claimant was shown in surveillance video moving her right arm and shoulder for the entire remainder of her shift on October 12, 2014 despite reporting to Dr. Wade that she was unable to move her right arm or shoulder. Claimant also has a significant history of right shoulder and neck problems prior to October 12, 2014 that she did not report to Dr. Wade. Dr. Wade acknowledged in his testimony that if movement of the right arm and shoulder was shown and if Claimant failed to accurately report her prior medical history, it would call into question the work relatedness of her right shoulder condition. As his opinion was based on incomplete/inaccurate information, his opinion regarding work relatedness is not as persuasive as the opinion of Dr. Roth.

53. Claimant's testimony lacks credibility. Claimant failed to report to multiple providers her prior right arm, right shoulder, neck, and right finger symptoms that pre-date her claim. The medical records document a significant history with symptoms the same or similar to those she alleges were caused by the October 12, 2014 work incident. Claimant had similar symptoms and problems in her right shoulder and neck dating back to at least 2009 and medical records document that in 2009 she reported having had pain in her right shoulder for the past two years. Similarly, in 2004 she was evaluated for right shoulder pain. The pain and symptoms in Claimant's right shoulder did not start as a result of the incident assisting Judy nor were they aggravated by the incident assisting Judy. The pain and symptoms had been ongoing for approximately 10 years prior to the work incident.

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 Workers' Compensation Act creates a distinction between the terms 'accident' and 'injury.' The term 'accident' refers to an 'unexpected, unusual, or undersigned occurrence.' *See* §8-40-201(1) C.R.S. In contrast, an 'injury' refers to the physical trauma caused by the accident. In other words, an 'accident' is the cause and an 'injury' is the result. No benefits flow to the victim of an industrial accident unless the accident results in a compensable 'injury.'" *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002). Notice of the accident is not equivalent to notice of claim for compensable injury." *See City and County of Denver v. Bush,* 441 P.2d 666, 668 (Colo. 1968). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden to prove by a preponderance of the evidence that she suffered a right shoulder or neck injury proximately caused by her employment and the act of assisting Judy onto a scooter. Here, Claimant's symptoms and pain in her right shoulder and neck pre-existed the October 12, 2014 incident. In October of 2009 it was noted that Claimant had already had injections in her right shoulder in the past and that when she used her right arm she had pain radiating into her shoulder and the right side of her neck. In June of 2011 it was noted that she had continued to have symptoms of right shoulder and right arm pain since 2009. In October of 2013 Claimant continued to report pain in her right shoulder and that it hurt to lift overhead, that she couldn't open jars, and that she couldn't put any tension on her right shoulder. Claimant reported the pain was aggravated by lifting her arm overhead. Claimant continued to report the same symptoms, but worse, in March of 2014. Approximately seven months prior to her alleged work injury Claimant reported that her right shoulder pain had been worse, that it continued to be aggravated with lifting and movement, and that it was difficult to do her hair because of the pain. Claimant has failed to show that the incident with Judy on October 12, 2014 exacerbated or aggravated the right shoulder pain and symptoms that were documented by medical providers as having existed prior to 2009 and that were documented to have gotten worse in March of 2014 to the point that doing her hair was difficult.

Additionally, Claimant reported immediate pain following the incident with Judy that caused her to be unable to use her right arm. This is not credible or persuasive and is contradicted by surveillance video. After Claimant alleges she suffered an injury assisting Judy, Claimant is seen on surveillance video for the remainder of the day performing her normal job duties. Claimant used her right arm overhead, at chest level on the computer system, and moved without any visible hesitation or pain. Claimant

also did not report the injury to Employer on October 12, 2014 and waited almost two weeks to make a report of injury. Claimant also sought medical treatment on her own with Dr. Paulsipher on October 24, 2014 without reporting to him a work injury. Dr. Paulsipher merely noted she was there for follow up of her continued right shoulder pain. These actions are inconsistent with someone who has suffered an acute injury or an acute aggravation to a pre-existing condition. If Claimant had suffered an injury on October 12, 2014 it would be more logically reasonable that she would have reported the injury immediately, discontinued using her right arm overhead or limited her use of her right arm, and that she would have reported the incident causing the injury to her doctor at a visit for treatment of her right shoulder.

Claimant has failed to show that the condition of her right shoulder was stable on October 12, 2014 and that the act of assisting Judy caused her pain and complaints to become disabling. Rather, the medical records show that the condition of her right shoulder had become symptomatic to the point of it being difficult to do her hair just seven months prior to her alleged injury. Additionally, the MRI and X-rays do not support a conclusion that she suffered an acute injury on October 12, 2014. The testimony of Dr. Roth is found credible and persuasive. Dr. Roth pointed out the discrepancies in Claimant's reports and credibly opined that her current condition was not trauma related and was not caused or aggravated by the October 12, 2014 incident. Even Dr. Wade noted that if the surveillance video showed Claimant performing her regular duties using her right arm on the day of the alleged injury, it might call into question his causality assessment. The surveillance does in fact show Claimant performing such activities including repeated use of her right arm above her head and at chest level. Further, Dr. Burnbaum noted that Claimant displayed symptom magnification and denied prior problems the medical records show she had similar problems dating back to at least 2009. Claimant has failed to show that she suffered an injury to her right shoulder and neck on October 12, 2014 or that her right shoulder and neck condition had been stable until the act of assisting Judy caused her pain and symptoms to become disabling. Rather the persuasive evidence and testimony is that Claimant suffered no acute injury or aggravation to a pre-existing condition on October 12, 2014 and that she simply continues to suffer from the same right shoulder and neck symptoms that have been bothering her since prior to 2009.

Claimant's reporting and testimony overall is not credible and cannot be relied upon to any degree of certainty. Less than seven months prior to the alleged work injury, Claimant was actively seeking treatment for right shoulder pain, reported the pain made it difficult to do her hair, and had pain significant enough in her right shoulder to undergo an injection into her right shoulder in March of 2014. Although Claimant had this significant treatment of her right shoulder less than seven months prior to her alleged work injury, she failed to report this treatment to multiple providers and reported no prior problems or treatment to her right shoulder. Claimant had symptoms prior to the alleged work injury that are almost identical to her continued symptoms to date and has failed to show that the incident with Judy aggravated in any way the symptoms that she has had in both her right shoulder and neck for the past several years.

Temporary Total Disability

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 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). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Claimant has failed to establish an entitlement to TTD benefits. Claimant did not suffer an injury or aggravation to a pre-existing condition on October 12, 2014. The incident on October 12, 2014 did not cause Claimant a disability lasting more than three work shifts or wage loss. Rather, Claimant had pre-existing non work related conditions in her right shoulder and neck and any lost wages or inability to work was due to the pre-existing and non work related conditions.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S.; *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*, *supra.* 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. *Id.* Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, *supra; See* § 8-41-301(1)(c), C.R.S. 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 failed to show by a preponderance of the evidence that she suffered an industrial injury. Therefore, Claimant has failed to establish that Respondents are liable for any continued medical treatment. Although continued treatment for her right shoulder and neck may be reasonable, any continued treatment would be related to her pre-existing conditions and not related to an industrial injury. The incident of October 12, 2014 did not cause the need for treatment or accelerate the need for treatment that pre-existed the claim.

Further, Claimant has failed to establish by a preponderance of the evidence that the treatment she sought on her own with Dr. Paulsipher on Oct 24, 2014 was authorized. The evidence and medical records show that Claimant sought treatment for her *continued* right shoulder pain, that Claimant did not report to Dr. Paulsipher that she had recently suffered a work related injury, and that the treatment was sought on her own before reporting any work related injury to Employer.

If upon notice of the injury the employer fails forthwith to designate an authorized treating provider (ATP), the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*. Here, Claimant did not make a report that could be recognized as possibly resulting in a claim for compensation until she reported the incident with Judy to Mr. Abila on October 25, 2014. The treatment she sought on her own prior to that date therefore was not authorized and is not compensable. After Claimant reported her injury to Employer, Employer promptly responded and referred Claimant for medical treatment. Therefore, Claimant has failed to establish that Employer failed to designate an ATP or that the right of selection of physician passed to her. Claimant has failed to establish that the treatment she sought with Dr. Paulsipher prior to reporting a work injury is authorized.

Penalties-Failure to Timely Report

As found above, Claimant failed to timely report the injury to Employer in writing within four days of her alleged injury, in violation of § 8-43-102(1)(a), C.R.S. Claimant did not notify Employer of her injury at all until a verbal report on October 25, 2014. Claimant did not report the injury in writing until October 30, 2014. As a manager for Employer, Claimant was aware of the requirements for reporting a work injury and posters at her workplace reiterated the requirements of reporting. However, as the claim is not compensable, the request for penalties of one day's compensation for the period of time during which Claimant failed to report the injury is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she suffered a compensable injury to her right shoulder and neck arising out of and in the course of her employment on October 12, 2014. Her claim is denied and dismissed.

2. Claimant has failed to establish that she is entitled to temporary total disability benefits. Her claim for temporary total disability benefits is denied and dismissed.

3. Claimant has failed to establish an entitlement to continued medical treatment of her right shoulder and neck. Her request for medical benefits is denied and dismissed.

4. Claimant has failed to establish that the treatment she received from Dr. Paulsipher on October 24, 2014 and the MRI ordered by him was authorized.

5. Respondents request for penalties is denied as moot.

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

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

DATED: September 9, 2015

/s/ Michelle E. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-966-994-01

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

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for September 25, 2015, in Greeley, Colorado. On August 26, 2015, the respondents filed a Motion for Summary Judgment with attached documents, asserting the there was no genuine issue of disputed material fact concerning the Claimant's announced residence in Westminster, Colorado, at the time of the Colorado medical visits for which he seeks mileage reimbursement from Florida to Colorado for a total of 11,460 miles, at the State mileage rate of 50 cents per mile, in an aggregate amount of $5,730.00.

On September 16, 2015, the Claimant filed an Objection to Motion for Summary Judgment, with the attached Affidavit of the Claimant, essentially alleging that he had arranged for the Postal Service to forward his Westminster, Colorado mail to Florida in early December 2014. There is **no** allegation that the Claimant advised the Respondents that he had moved back to Florida and/or that he would be commuting from Florida to Colorado to attend medical appointments.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact concerning whether the Claimant gave the Respondents proper notice that he was moving from Westminster, Colorado to Florida, thus, entitling him to mileage of 11, 460 miles to commute from Florida to Colorado to attend medical appointments related to his admitted work-related injury to two of his toes on November 19, 2014.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant sustained an admitted workplace injury to two of his toes on November 19, 2014.

2. Following his industrial injury, the Claimant filled out and signed a First Report of Injury/Incident Form. The form included a box labeled "home address." He stated his home address as:

> 14770 Orchard Parkway, Apartment 335
> Westminster, CO 80023

This address is hereinafter referred to as the "Westminster address." The Claimant's First Report of Injury/Incident Form is lists his address as the Westminster address. The Claimant listed the same address as his home address on his 2014 W-4 form.

Lack of Notice of Change of Address to Florida

3. The Claimant began receiving indemnity payments from the Respondents, starting on November 25, 2014. From November 25, 2014 through February 17, 2015, the Claimant's indemnity checks were sent to the Westminster address. The Claimant's Affidavit, attached to his Objection to Motion for Summary Judgment states that he "arranged for the postal Service to forward my mail to Florida in early December 2014. I received all my TTD checks after that in Florida as a result of the forwarding." There is no allegation by the Claimant that he advised the Respondents of this forwarding situation nor is there any indication or allegation that the Respondents were aware of the inner working of the Postal Service in this situation.

4. One of Claimant's authorized treating providers was Frederick Scherr, M.D. On December 18, 2014, the Claimant reported to Dr. Scherr that "he is now going

to be moving back to Florida sometime in January, which is where he is originally from." This was the first mention in the Claimant's medical records of his intention to move to Florida.

5. A claim representative for the Respondent Insurer, Pinnacol, was in direct communication with the Claimant during this time period. On December 22, 2014, the claim representative, James Mysza, had a conversation with the Claimant. The Claimant told Mysza that he was moving to Florida, but the date was unknown. The Claimant represented that he would likely move after seeing his physicians on January 12, 2015. Mysza documented the conversation in the claim file. The Claimant is noted as "IW" or injured worker (portions of the claim notepad were attached to the Respondents' Motion as Exhibit E. The affidavit of James Mysza was attached as Exhibit F.

6. Mysza spoke with the Claimant again on January 5, 2015. The Claimant again stated that he was planning on moving to Florida after January 12, 2015, but was unsure of the date.

7. The Claimant had another visit with Dr. Scherr on January 12, 2015. He remarked to Dr. Scherr that: "He is also in the process of moving to Florida and only has his apartment to the end of the month. He would like to get back to Florida here soon and not have to keep coming back and forth."

8. Mysza spoke with the Claimant on January 12, 2015. At that time, the Claimant stated that he would be moving to Florida at the end of January 2015.

9. Mysza spoke with the Claimant on January 28, 2015. On that date, the Claimant told Mysza that he had not moved yet, and that the move would be sometime after February 9, 2015.

10. The Claimant had his final visit with Dr. Scherr on February 9, 2015. Dr. Scherr noted: "He is moving back to Florida. He is just kind of going back and forth between Florida and here until his care is finished up with us."

11. At all times material (December 4, 2014 through February 9, 2015), the Claimant had never submitted a change of physician request or a change of address form.

12. At all times material (December 4, 2014 through February 9, 2015), the Claimant had never asked the Respondents to transfer his care to Florida.

13. The Claimant is seeking mileage for physician visits on the following dates: December 4, 2014, December 18, 2014, and February 9, 2015. His answers to interrogatories are attached hereto as *Resp. Exhibit I, p. 5*. Claimant alleges that he

moved from the Westminster address to Sarasota, Florida on December 7, 2014. Exhibit I, p. 3. He claims that he is entitled to reimbursement for 11,460 miles traveled, despite his actual travel costs being significantly lower than the mileage reimbursement rate. *Exhibit I, p. 4*. The Claimant admits in his discovery responses that he never apprised the Respondents that he had moved to Florida.

Ultimate Findings

14. There is no genuine issue of disputed material fact that the Claimant had **not** given the Respondents notice that he had moved from Westminster, Colorado to Florida as of the times he seeks mileage reimbursement for attending medical appointments in Colorado.

15. An intent to live in a state other than the last known address in Colorado does not establish entitlement to greatly enhanced mileage reimbursements from Florida, the announced intended new residence, to Colorado and back.

16. The attachments to the Respondents' Motion show that there is no genuine issue of disputed fact with respect to their lack of knowledge that the Claimant had moved from Westminster, Colorado to Sarasota, Florida. The Claimant's affidavit, attached to his Objection, fails to allege any notice of an **actual** move from Westminster, Colorado to Sarasota, Florida.

17. The Respondents were reasonable in believing that the Westminster, Colorado address was the Claimant's home address. The Claimant represented that the Westminster address was his home address in government documents (his W-4), and the injury report that he filled out just after his injury.

CONCLUSIONS OF LAW

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

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

found, the Motion for Summary Judgment and the Response thereto are supported by documents and/or affidavits.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the attachments to the Respondents' Motion show that there is no genuine issue of disputed fact with respect to their lack of knowledge that the Claimant had moved from Westminster, Colorado to Sarasota, Florida. The Claimant's affidavit, attached to his Objection, fails to allege any notice of an **actual** move from Westminster, Colorado to Sarasota, Florida.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in its pleadings, but its response by affidavits or other means must set forth specific facts showing that there is a genuine issue of disputed material fact. C.R.C.P., Rule 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment; contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center, Inc.*, 701 P.2d 114 (Colo. App. 1985). Indeed, the Claimant's Objection and his affidavit attached thereto, **do not** allege that the respondents had notice or knowledge of the Claimant's **actual** (not intended) move from Westminster, Colorado to Florida. Consequently, the Claimant's Objection fails to raise any genuine disputed issue of material fact.

<u>No Notice of Actual Move to Florida</u>

d. The "general rule is that a claimant is responsible for keeping the Division, opposing parties and their counsel advised of the claimant's current address. The claimant's official address for purposes of a workers' compensation claim is the claimant's home address." *Hroncheck v. California Cafe*, W.C. No. 4-496-790 [Indus. Claim Appeals Office (ICAO), July 14, 2003] (citing *Bowlen v. Munford*, 921 P2d 59 (Colo. App. 1996). As found, the Claimant did **not** keep the Respondents apprised of his change of address to Florida. As further found, the Respondents were reasonable in believing that the Westminster address was Claimant's home address. Claimant represented that the Westminster address was his home address in government documents (his W-4), and the injury report that he filled out just after his injury.

<u>Burden of Proof</u>

e. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, there is no genuine issue of disputed material fact concerning the Claimant's failure to notify the Respondents of his **actual** move from Colorado to Florida nor is it alleged that the Respondents knew of the **actual** move. The respondents have sustained their burden in this regard.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment on the mileage issue is hereby granted in the Respondents' favor.

B. The scheduled hearing of September 25, 2015 is hereby vacated.

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

DATED this_____day of September 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

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

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

_____
Court Clerk

Wc.sjord

ISSUES

The issues for determination are:

1. Whether the claimant suffered a compensable industrial injury on or about September 8, 2014;

2. If so, whether the claimant is entitled to medical benefits to cure and relieve the alleged injury; and,

3. If so, whether the claimant is entitled to TTD after October 28, 2014.

FINDINGS OF FACT

1. The claimant has acknowledged that she has been diagnosed with rheumatoid arthritis since 2008. The claimant also admits that she has been treated for her rheumatoid arthritis since 2008.

2. The claimant also admitted that she has carried the diagnosis of osteoarthritis in her back and degenerative disk disease prior to September 2014.

3. The claimant was treated by a chiropractor named Dr. Craig Thornally for the period of time between November 7, 2013 and October 29, 2014. Prior to September 8, 2014, the claimant saw Dr. Thornally 36 times. For each visit, the claimant indicated what her levels of low back pain were. On average, the claimant reported levels of anywhere between 5-6 out of 10, with her highest pain levels being 9 out of 10. For the office visit just prior to September 8, 2014 (June 27, 2014), the claimant reported that her low back pain was 5 out of 10. Although the chiropractic records reflect that the claimant did not see Dr. Thornally between June 27, 2014 and September 8, 2014, Dr. Scott testified that it was unlikely that the claimant had resolution of her low back problems between those two dates. Dr. Scott based his opinion on the fact that the medical records reflected that the claimant had a chronic low back problem prior to September 8, 2014, as well as rheumatoid arthritis.

4. The claimant is alleging that she sustained an injury to her low back while providing a two-person transfer of a resident. The claimant testified at hearing that the

other person helping her during the two-person transfer was a co-employee named Arianna. The claimant testified that the injury occurred when the resident became agitated and aggressive during the transfer, resulting in her twisting her back and having an injury.

5. The claimant has apparently been confused as to what was the actual date of injury. The claimant testified at hearing that at her independent medical evaluation with Dr. Douglas Scott, she told Dr. Scott that the injury occurred on September 8, 2014. The claimant then testified that in her answers to interrogatories, she indicated that the date of injury was September 9, 2014. Finally, in her Workers' Claim for Compensation that was completed on November 2, 2014, by the claimant herself, she indicated the date of injury was September 12, 2014.

6. The claimant, at hearing, stated that she is picking September 8, 2014 as her final date of injury. The claimant then testified that on September 8, 2014 (the date that she said the injury occurred), she talked to the executive director of the facility, Shawn Anderson, to report this incident. The claimant testified that her discussion with Mr. Anderson occurred at the facility at which time she completed the incident report and gave it back to Mr. Anderson on the same day. However, Mr. Anderson testified that on September 8, 2014, he was not at the facility because it was his birthday and he was on vacation.

7. As outlined above, the claimant indicated that she suffered a low back injury at the time that she was assisting another co-employee, Arianna Ahern, in transferring a resident, at which time the resident became agitated and aggressive, resulting in the claimant suffering a low back injury. However, Arianna Ahern testified that, at no time during the month of September 2014, did she help transfer a female patient with the claimant who, at the time of the transfer, became agitated, aggressive, and combative. Ms. Ahern testified that if a resident does become combative or aggressive, the procedure at the facility mandates that she complete a behavioral report documenting the incident. Ms. Ahern testified that at no time during September 2014 did she complete any kind of form in which a resident became combative and aggressive during a transfer involving the claimant.

8. Lisa Wayne was the claimant's immediate supervisor. Ms. Wayne testified that she is the Reminiscence coordinator for the facility. The Reminiscence unit houses residents that need assistance because they suffer from Alzheimer's or Dementia.

9. Ms. Wayne testified that at no time between September 8, 2014 and October 27, 2014, did the claimant report that she had any kind of injury at work as a

result of transferring a resident. Ms. Wayne testified that at no time did the claimant, during that time period, complain of suffering low back pain. Ms. Wayne also testified that, at no time during that time period, did the claimant state that she was having any kind of ongoing back pain that was in any way preventing her from performing her job.

10. The claimant acknowledged that on September 8, 2014, she went to Dr. Thornally for a chiropractic adjustment. Although the claimant, at hearing, testified that she went to see Dr. Thornally because of excruciating pain, the pain log that she completed indicated that her low back pain at that time was 6 out of 10. Dr. Scott testified that the claimant reporting a 6 out of 10 pain on September 8, 2014, was not significantly higher than what her average pain levels were between November 7, 2013 and September 8, 2014 (a 5-6).

11. The claimant, during her evaluation with Dr. Scott, stated that when Dr. Thornally saw the claimant on September 8, 2014, Dr. Thornally did not believe that the claimant had any kind of new problem. Dr. Scott explained that the claimant's reporting of her level of low back pain prior to September 8, 2014, as compared to what she reported on September 8, 2014, indicated that there was not any kind of acute specific incident of increased pain. In fact, according to the claimant, the only thing that Dr. Thornally recommended at that time was another chiropractic adjustment.

12. The claimant was terminated from her job as of October 27, 2014. Less than a week later, on November 2, 2014, the claimant, for the first time, completed a Workers' Claim for Compensation. The claimant, at that time, reported that the injury occurred on September 12, 2014, at 6:00 a.m. However, the claimant acknowledged telling Dr. Scott that she told him the injury occurred on September 8, 2014. The claimant also told Dr. Scott that the injury occurred around noon.

13. Two days after the claimant was terminated from her job, she returned to see Dr. Thornally. At that time, the claimant was reporting that her pain levels in her low back was 2 out of 10. As of October 29, 2014, the severity of the claimant's low back pain was significantly lower than what her average base line low back pain was prior to September 8, 2014.

14. The claimant received chiropractic treatment with Dr. Forest Fix beginning March 10, 2015. It appears that the last time that the claimant saw Dr. Fix was on May 18, 2015. In comparing what the claimant reports to both Dr. Thornally and Dr. Fix in terms of the location of her pain and the severity of her pain, the claimant's reports of pain to Dr. Fix at this time are substantially similar to what her reports of pain were to Dr. Thornally prior to September 8, 2014.

15. As noted above, Dr. Douglas Scott performed an IME of the claimant on May 7, 2015. As noted by Dr. Scott, the claimant, at the time that she saw Dr. Scott, did not mention to him that she had a history of rheumatoid arthritis. After reviewing the medical records from Dr. Thornally, Dr. Scott believed that the claimant's rheumatoid arthritis most likely explained the presentation of the levels of pain in multiple areas as documented by Dr. Thornally. As explained by Dr. Scott, rheumatoid arthritis is an inflammatory disease that usually affects multiple joints. Someone with rheumatoid arthritis can complain of neck pain, arm pain, upper back pain, shoulder pain, mid-back pain, lower back pain, hip pain, and leg pain. As a result, Dr. Scott was of the opinion that a trauma of any kind to the claimant's low back condition was not a pre-condition for the symptom presentation that the claimant demonstrated subsequent to September 8, 2014.

16. When Dr. Scott was asked to assume that a trauma of some kind did in fact occur on September 8, 2014, it was his opinion that, based on his review of the medical records, that, at best, a trauma occurring on September 8, 2014, represented nothing more than a temporary flare-up of the claimant's pre-existing back problems that most likely resolved fairly quickly, if not spontaneously.

17. The ALJ finds Dr. Scott's analyses and opinions to be credible and persuasive.

18. The ALJ finds that the claimant has failed to establish that it is more likely than not that she sustained a compensable injury arising out of and in the course of her employment with the respondent-employer during the month of September 2014.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure 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)*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury rose out of the course and scope of his employment, *Section 8-41-301(1);* see *City of Boulder v Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in the favor of Respondent. *Section* 8-43-201.

2. A workers' compensation case is decided on its merits. *Section* 8-43-201. The ALJs' factual findings need only concern evidence that is dispositive of the issues involved. The ALJ does not need to address every piece of evidence that might lead to a conflicting conclusion and reject 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 finders should consider, among other things, the consistency or inconsistency of the witnesses' testimony and action; the reasonableness or the unreasonableness (the probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interests. *See Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

4. As outlined above, the claimant has a significant history of chronic low back pain that, according to Dr. Scott, dates back 10 to 20 years. The claimant, prior to September 8, 2014, had been seeking chiropractic care with Dr. Thornally, at which time she reported low back pain that averaged 5 to 6 in severity. The claimant did see Dr. Thornally on September 8, 2014, but her own reports of pain indicated that they were pretty much at baseline (6). The claimant, herself, told Dr. Scott that Dr. Thornally did not think there was any new problem, and provided her a regular chiropractic adjustment.

5. The greater weight of medical evidence establishes that the claimant did not suffer any kind of compensable injury as a result of the incident reported on November 2, 2014, when she completed her Workers' Claim for Compensation.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffered any kind of compensable injury as a result of any incident occurring in September 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: September 14, 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 following issues were raised for consideration at hearing:

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

2. Whether the right to select an authorized treating provider passed to Claimant.

FINDINGS OF FACT

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

1. Claimant was hired by Employer on March 20, 2014, as a driver and loader. Claimant's duties for Employer included driving to various job sites, removing unwanted items and hauling them away. Claimant suffered an admitted work injury on September 29, 2014.

2. Claimant's initial rate of pay for Employer was $11.00 per hour. Claimant received a pay raise on September 8, 2014, to $13.50 per hour. When Claimant started working for Employer, he was not working in a full time capacity. In March, April and May of 2014, business at employer was slow and Claimant only worked between ten and twenty hours per week. Claimant's periods of low pay at Employer in March, April and May of 2014 was due, in part, to the fact that Claimant volunteered to give up his shifts at Employer during this slower period while Claimant worked at his second job at Two Men with Big Hearts Moving and Storage, where he received more working hours and earned more.

3. At Two Men with Big Hearts Moving and Storage, Claimant was employed as a driver, loader and mover between February and May of 2014. Claimant testified that he voluntarily left his job with Two Men with Big Hearts Moving and Storage because he was offered more hours at Employer.

4. In May 2014, Claimant's hours increased at Employer, although his hours continued to fluctuate depending on work availability.

5. Mr. Paul Durant, the owner of Employer, employed between six and nine workers in 2014. Each employee's hours depended on the amount of work Employer had available. Employer's busiest time of year starts in March or April, and continues until August. Mr. Durant did not guarantee any of his employees any number of hours,

but when hours were limited, he made an effort to give employees who were top performers as many hours as possible. Mr. Durant considered Claimant to be one of the top performers.

6. Using Employer's payroll records for Claimant's dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation reflects a fair and accurate approximation of Claimant's AWW at the time of his injury on September 29, 2014.

7. Claimant injured his right shoulder while performing work-related duties on September 29, 2014. Respondents filed General Admissions of Liability, dated April 2, and 30, 2015, for medical and temporary disability benefits. Respondents admitted for an AWW of $463.36

8. Mr. Durant was Claimant's supervisor on September 29, 2014. The parties offered conflicting evidence regarding whether Claimant discussed the September 29, 2014, work injury with Mr. Durant on September 30, 2014. Claimant maintained that he told Mr. Durant he had a work injury and needed medical attention but was provided none. Mr. Durant maintained that Claimant indicated he injured himself but he did not need medical attention on September 30, 2014. Mr. Durant advised Claimant to keep him posted whether he needed medical attention. Mr. Durant maintained, and it is found that, Employer was not advised that Claimant needed medical attention until November 2014 when Claimant advised Mr. Durant that his private health insurance provider diagnosed a rotator cuff tear.

9. Following the September 29, 2014, injury, Claimant sought treatment on his own through his primary care physician at Denver Health Medical Center, David Ginosar, M.D. In October 2014, Claimant began treating with Dr. Ginosar for the injuries sustained in this claim. Dr. Ginosar diagnosed Claimant with a rotator cuff tear.

10. In mid-November of 2014, following Dr. Ginosar's diagnosis, Claimant advised Mr. Durant he was diagnosed with a right rotator cuff tear. Mr. Durant instructed Claimant to seek medical care from Michael V. Ladwig, M.D. of Aviation and Occupational Medicine. Mr. Durant also instructed Claimant to discontinue treatment at Denver Health Medical Center. Claimant was not given a choice of providers from whom to seek treatment during the conversation with Mr. Durant in November of 2014.

11. Claimant began treatment with Dr. Ladwig on November 26, 2015. Since that date, Claimant has treated with Dr. Ladwig and the physicians to whom Dr. Ladwig has referred Claimant. Since commencing treatment with Dr. Ladwig, Claimant has not returned to Denver Health Medical Center for treatment related to his right shoulder.

12. The right of selection of a medical provider passed to Claimant in November 2014, when Claimant was not provided a choice of two medical providers as required by Section 8-43-404(5)(a), C.R.S.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

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

2. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

a. Average Weekly Wage

3. In this case, Claimant contends that he is entitled to increased AWW. The AWW of an injured employee shall be taken as the basis upon which to compute compensation payments. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. Section 8-42-102(1), C.R.S.; *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

4. When an injured employee is being paid by the hour, the AWW is usually determined using the "hourly rate" at which the employee was working "at the time of the injury or would have worked if the injury had not intervened." Section 8-42-102(2)(d), C.R.S. If this method does not result in a fair calculation of the injured worker's AWW, then subsection (3) of Section 8-42-102 may apply. An administrative law judge has broad discretion in calculating the employee's AWW according to the facts of the case. *RJS Painting v. Industrial Commission of State*, 732 P.2d 239 (Colo. App. 1986).

5. Using the procedure set forth in Section 8-42-102(2)(d), C.R.S., it is necessary to determine how much Claimant was earning at Employer at the time of the injury, or how much Claimant was likely to have earned had the injury not occurred. This is most fairly and accurately determined by considering checks issued to Claimant by Employer between July 18, 2014, and September 26, 2014. This period constitutes the 12-week period leading up to Claimant's injury, and excludes a period when Claimant was working reduced hours at a lower rate of pay

6. Using dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation is in accordance with Section 8-42-102(1)(d),

C.R.S., and reflects a fair and accurate approximation of Claimant's AWW at the time of his injury.

7. Respondents contend that Claimant's AWW is $463.36 using Claimant's pay between February 24, 2014 and September 26, 2014, combining wages earned from Employer and a concurrent employer, Two Men with Big Hearts Moving and Storage. Respondents' calculation of AWW is rejected as Respondents' calculation includes a period of almost four weeks wherein Claimant had not yet been hired as an employee for Employer and Respondents' calculation uses a period of time immediately following Claimant's date of hire when he volunteered to work reduced hours for Employer.

b. Authorized Treating Physician

8. Claimant contends that the right to select a medical provider passed to him when Respondents failed to comply with Section 8-43-404(5)(a)(I)(A). This section provides that:

> "In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee."

9. The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

10. This statute affords the employer the right to designate at least two physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of Section 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

11. If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

12. The credible and persuasive evidence presented at hearing established that November 2014 is when Mr. Durant was first advised that Claimant's September 29, 2014, work injury required medical attention. At that time, Mr. Durant referred Claimant to Dr. Ladwig and failed to comply with Section 8-43-404(5)(a), C.R.S. by providing Claimant with the choice to two medical providers from which to choose a provider. Therefore, the right of selection of medical provider passed to Claimant in November 2014.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $543.18.

2. The right to select an authorized treating physician passed to Claimant in November 2014. Claimant shall appoint an authorized treating physician and notify Respondents of his choice within seven (7) business days of the date of this Order.

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

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

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

DATED: __August 27, 2015___

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

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

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits beginning July 18, 2014 and continuing?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employer?

FINDINGS OF FACT

1. Claimant was employed as a dishwasher with employer beginning in approximately 2007. Claimant testified he worked approximately 8-9 hours per day and 35-40 hours per week for employer. Claimant testified that on July 18, 2014 he was carry a box of glass dishes when he tripped and fell with the box hitting claimant on the knees. Claimant testified that the incident was witnessed by his boss, Mr. Harvey, who inquired if he was OK. Claimant testified following this incident, his bone started hurting and felt like sand. However, claimant continued to work for employer.

2. Claimant testified he eventually went to El Salvador to deal with a family emergency in October 2014. Claimant testified he received an injection into his knee in El Salvador in November 2014. Claimant testified he returned to the United States on December 5, 2014 and went to a physician in the United States in December 2014.

3. The employment records establish that claimant continued to work for employer until October 12, 2014.

4. The medical records entered into evidence document that claimant sought medical treatment for his left knee on July 28, 2014 from Dr. Stanton with Mountain Family Health Center. Claimant reported to Dr. Stanton that there was no injury, but his pain was piercing and sharp and aggravated by movement and walking. Claimant reported an onset of pain 4 months ago.

5. At hearing, claimant testified he did not recall receiving medical treatment to his left knee on July 28, 2014.

6. Claimant returned to Mountain Family Health Center on December 11, 2014 and was evaluated by nurse practitioner Menke. Claimant reported an onset of left knee pain six months ago associated with an injury. The records do not indicate claimant's injury was work related, however.

7. Claimant eventually underwent an x-ray of the left knee on January 2, 2015. The x-ray demonstrated degenerative changes with no evidence of an acute fracture.

8. Respondents presented the testimony of Mr. Harvey at hearing. Mr. Harvey testified he worked with claimant as his supervisor on a daily basis. Mr. Harvey testified he noticed claimant limping prior to July 2014. Mr. Harvey testified he did not recall claimant tripping and falling with a large stack of plates in July 2014.

9. Mr. Harvey testified claimant was terminated on October 15, 2014 after he violated the employer's no call/no show policy of not showing up for a scheduled shift on 2 consecutive occasions. Mr. Harvey testified claimant's violation of this policy occurred on October 13, October 14 and October 15, 2014.

10. The ALJ finds the testimony of Mr. Harvey to be credible and persuasive.

11. Respondents referred claimant for an independent medical examination ("IME") with Dr. Fall on July 16, 2015. Dr. Fall reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME. Dr. Fall issued a report that noted claimant's accident history of an injury occurring on July 18, 2015 when he was carrying plates, tripped over a box and fell on both knees. Dr. Fall noted claimant reported he did not feel pain until the next day and did not report the injury to human resources.

12. Dr. Fall noted claimant's medical treatment on July 28, 2014 that did not indicate a work injury. Dr. Fall opined in her report that claimant had osteoarthritis of his left knee, but opined that the knee complaints predated the alleged injury on July 18, 2014.

13. Dr. Fall testified at hearing consistent with her IME report.

14. The ALJ credits the medical records entered into evidence that document a 4 month history of knee pain without a specific injury in July 2014, along with the testimony of Mr. Harvey and finds that claimant has failed to demonstrate that it is more likely true than not that claimant sustained a compensable injury arising out of and in the course of his employment with employer.

15. Because of the ALJ's conclusion regarding the compensable nature of claimant's alleged injury, the other issues raised at hearing need not be addressed.

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 failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. As found, the medical records from Mountain Family Health Center indicating in July 2014 that claimant had knee pain with an onset 4 months ago is more credible and persuasive than claimant's testimony at hearing that his knee pain started after he fell at work on July 18, 2014. As found, the testimony of Mr. Harvey that he did not recall witnessing claimant carrying a large stack of plates and falling to the ground is more credible and persuasive than claimant's testimony that such an incident occurred.

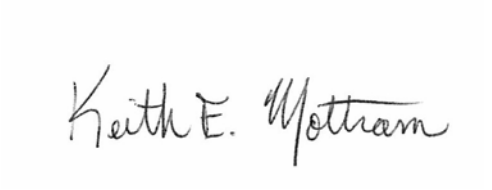
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

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

DATED: September 10, 2015



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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of his work injury and provided by a physician who was authorized to treat claimant for his injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of November 10, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer as a pipeline rig welder. Claimant testified that his job duties included welding on a natural gas pipeline in an area located above Debeque, Colorado where a new natural gas pipeline was being installed by employer.

2. Claimant testified that on August 11, 2014 he was welding a pipe and put the pipe into the ditch, but the pipe didn't fit in the ditch and needed to be cut. Claimant testified when he cut the pipe in the ditch, the pipe rolled and pinned him in the ditch. Claimant testified he was in a lot of pain and felt paralyzed from the waist down and was carried out of the ditch by a co-worker.

3. Claimant testified he was put into the passenger side of his truck and his helper, Mr. Montes, drove claimant towards town before stopping at the right of way where they had cell phone reception and calling the superintendant for employer ("Carlos"), who drove up to where claimant was parked. Claimant testified he spoke to another supervisor on the phone, Mr. Wilson, who told claimant to go home and "let it ride out a few days".

4. Mr. Montes testified at hearing in this matter. Mr. Montes worked with claimant as a team with claimant welding pipelines and Mr. Montes helping claimant. Mr. Montes testified they worked together for 2 ½ years. Mr. Montes testified he did not see the injury occur, but was told later by a co-worker that "your welder got hurt." Mr. Montes testified he took claimant to the truck and drove claimant home. Mr. Montes

testified he spoke to the superintendant on the phone while driving claimant home. Mr. Montes testified that claimant was off of work for approximately a week after the injury.

5. Mr. Wilson testified at hearing for respondents. Mr. Wilson testified he is the area manager for employer, but was the project manager at the time of claimant's injury. Mr. Wilson testified he received a phone call from the superintendent and another worker, Mr. Bradshaw, telling him of claimant's injury. Mr. Wilson testified he drove from Rangely, Colorado to the job site, a drive that took approximately two hours and twenty minutes. Mr. Wilson testified when he got to the job site he spoke to claimant, Mr. Bradshaw and Carlos to determine what had happened. Mr. Wilson testified he thought he spoke to claimant in person, but may have spoken to him on the phone.

6. Mr. Wilson testified claimant told him his knee was sore and he asked claimant if he wanted to see a doctor, to which claimant replied in the negative. Mr. Wilson testified he told claimant to take it easy for a couple of days.

7. Claimant testified Mr. Wilson eventually took claimant to the company's doctor at Grand River Medical on August 14, 2014. Mr. Wilson confirmed this in his testimony. The medical records from Mr. Zimmerman, the physician's assistant with Grand River Medical document that claimant was evaluated on August 14, 2014 and reported an injury in which both knees were smashed between a ditch and a pipe. The ALJ finds the medical records document claimant having ecchymosis present medially on both knees. Mr. Zimmerman released claimant to return to work full duty and instructed to follow up in 2 weeks.

8. The ALJ finds claimant was referred to Grand River Medical by employer and finds the treatment provided by Grand River Medical is authorized by the referral from employer.

9. The records indicate claimant was laid off from his work with employer on or about September 12, 2014.

10. Claimant returned to Mr. Zimmerman on September 15, 2014 and reported doing much better. Mr. Zimmerman recommended claimant continue with conservative treatment and return in one month. Claimant was noted to be complaining of stiffness and soreness in his left knee with a bit of swelling in his right knee during this visit.

11. Claimant testified Mr. Wilson paid for the medical treatment with a credit card. Mr. Wilson confirmed on his testimony that he paid for the first two medical appointments with Grand River Medical with a credit card. Mr. Wilson further confirmed that after the first medical appointment, he told claimant to take a week off of work and employer would pay his regular wages. Mr. Wilson testified he attended the medical appointments and was in the room as claimant was evaluated on these two occasions.

12. The ALJ concludes based on the testimony of claimant, Mr. Montes and Mr. Wilson that claimant sustained a compensable injury at work on August 11, 2014

that resulted in the need for medical treatment. Therefore, claimant has sustained his burden of proof establishing that he sustained a compensable injury in the first instance.

13. Claimant stopped working for employer at some point on or about October 2014 and immediately began working for Fugal, a different employer that performs the same pipeline welding work.

14. Claimant returned to Mr. Zimmerman at Grand River Health on November 10, 2014. Claimant testified that no representative from employer attended this visit with claimant. Mr. Zimmerman noted that claimant complained that his knees were getting worse instead of getting better. Mr. Zimmerman referred claimant to orthopedics for a second opinion and further evaluation and provided claimant with work restrictions of no lifting over 20 pounds and no crawling, kneeling, squatting or climbing.

15. Respondents filed a Notice of Contest on February 3, 2015 denying liability for the claim pending further investigation.

16. Claimant testified at hearing that he was unable to perform his regular duties of employment with Fugal and was laid off approximately November 6, 2014. Claimant testified that after his injury, he was working the back end of the welding pipe which is easier work and did not require claimant to have to jump over the pipe.

17. There was conflicting testimony presented as to whether claimant was signed in for work following his injury by employer. Claimant acknowledged that his signature appeared on the sign in sheet after his injury before his first medical appointment. Mr. Wilson testified however, that claimant did miss several days of work after his first appointment with Grand River Medical at the direction of Mr. Wilson who advised claimant to take a week off. Employer paid claimant his normal wages during this time off even though he was not at work.

18. Claimant testified he has not worked since receiving the medical restrictions from Mr. Zimmerman with Grand River Health. Claimant testified he could not perform his regular work with employer with the 20 pound work restrictions set forth by Grand River Health. Claimant testified he has been called by Fugal regarding work, but he is not able to perform the work with his restrictions.

19. The ALJ finds the testimony of claimant to be credible and persuasive on this point and finds that claimant has demonstrated that the work injury has resulted in restrictions set forth by Mr. Zimmerman with Grand River Health and that the restrictions have resulted in a wage loss for claimant. Therefore, the ALJ finds claimant has sustained his burden of proving that he is entitled to an award of temporary total disability ("TTD") benefits beginning November 10, 2014 and continuing until terminated by law or statute.

20. Claimant subsequently sought treatment from Dr. Mistry for low back pain with paresthesias in his feet and radiation to his buttock area on March 17, 2015. Dr. Mistry recommended claimant undergo a magnetic resonance image ("MRI") of the lumbar spine and a right knee MRI. The ALJ finds that claimant was referred by Mr.

Zimmerman for othropedic evaluation on November 10, 2014 and finds that Dr. Mistry performed the orthopedic evaluation pursuant to the referral. The ALJ notes that Mr. Zimmerman did not specify the orthopedic physician to perform the evaluation, but finds that Dr. Mistry's evaluation is consistent with this referral.

21. Claimant was referred by employer for an independent medical evaluation ("IME") with Dr. Brunworth on April 13, 2015. Dr. Brunworth reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME.

22. Dr. Brunworth noted claimant's complaints of knee pain over the medial joint line as well as proximal and distal to the medial joint line. Dr. Brunworth also noted mild crepitus in the knee and tenderness in the lumbosacral junction. Dr. Brunworth performed range of motion testing in connection with her IME. Dr. Brunworth diagnosed claimant with low back and lower extremity complaints and noted that claimant's complaints were suggestive of an L5-S1 herniated disc with bilateral radiculopathy. Dr. Brunworth noted that claimant reported having low back pain ever since his injury, but that was not noted in the medical records. Dr. Brunworth recommended further treatment including an MRI of the right knee and an MRI of the lumbar spine. Dr. Brunworth noted that if claimant did not have an injury to the low back, than only an MRI of the right knee would be indicated.

23. Dr. Brunworth testified by deposition in this matter. Dr. Brunworth noted that examination of claimant following the injury revealed a negative McMurray's exam and a negative Lachman's test. Dr. Brunworth further testified that when claimant was examined on November 10, 2014, there was no mention of claimant complaining of back pain in the medical records. Dr. Brunworth testified that claimant reported to Dr. Mistry of back pain, which was different that what the records from Mr. Zimmerman had indicated were his complaints.

24. Dr. Brunworth testified that if claimant had injured his back on August 11, 2014, she would have expected claimant to tell his providers about the back pain and radicular pain. Dr. Brunworth testified that it was her opinion that there was some injury to claimant's knees in the accident in August. Dr. Brunworth testified that if claimant did have a meniscal injury in August, and was doing activities, it was possible that the injury set claimant up to have a worsening if he was still very active.

25. The ALJ credits the medical records from Mr. Zimmerman and finds that claimant has failed to demonstrate that it is more likely true that the treatment recommended to his low back, including the lumbar spine MRI, is related to the August 11, 2014 work injury.

26. The wage records entered into evidence establish that claimant was paid an hourly wage, overtime, a per diem and rig rental. The ALJ finds that the AWW should not include the rig rental paid by employer to claimant as there is no indication under the Colorado Workers' Compensation Act that the rig rental is a component of the calculation of the AWW.

27. Claimant earned $9,363.50 in the three weeks prior to his injury if the rig rental is not included in the AWW calculation (wages included the week ending July 27, 2014, August 3, 2014 and August 10, 2014). This results in an AWW of $3,121.17.

28. The ALJ finds that claimant has failed to prove that it is more probable than not that the payment made to claimant by employer for the "rig rental" is a fringe benefit that would allow for the payment to be included in the AWW calculation under the Colorado Workers' Compensation Act.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he was pinned between the pipe and the wall of the ditch.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).\

6. As found, the treatment claimant received from Grand River Medical to claimant's knee was reasonable, necessary and related to claimant's August 11, 2014 work injury.

7. As found, claimant has failed to demonstrate that the recommended treatment for his alleged back injury is reasonable, necessary and related to his August 11, 2014 work injury. Claimant request for payment of the treatment provided by Dr. Mistry to claimant's back condition, including the lumbar spine MRI is denied.

8. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

9. The ALJ finds that claimant was referred by Grand River Medical for orthopedic evaluation on November 10, 2014. The ALJ finds that claimant underwent an orthopedic evaluation with Dr. Mistry pursuant to that referral and finds the treatment provided by Dr. Mistry to be consistent with this referral and finds his treatment for his knee to be reasonable, necessary and related to claimant's work injury and authorized by virtue of the referral from Mr. Zimmerman with Grand River Medical.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Wages are defined

under Section 8-40-201(19)(b) to include "the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefits not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

11. Claimant argued at hearing that his AWW should include the money he earned from the rig rental paid by employer to claimant for purposes of using his truck to complete his job. However, under Section 8-40-201(19)(b), C.R.S. does not indicate a basis for the ALJ to include the "rig rental" payment as a fringe benefit for claimant in calculating his AWW.

12. As found, claimant's AWW for his August 11, 2014 injury is properly calculated at $3,121.17.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided by Grand River and Dr. Mistry, who are found to be authorized to provide treatment for claimant's knee injury.

2. Claimant request for an Order requiring respondents to pay for medical treatment to his low back is denied.

3. Respondents shall pay claimant TTD benefits for the period of November 10, 2014 and continuing based on an AWW of $3,121.17.

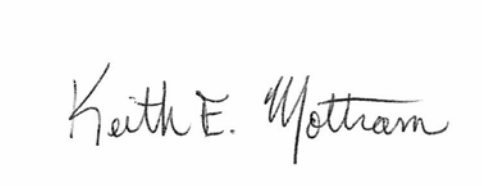
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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: September 25, 2015



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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

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

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence he is entitled to an award of temporary total disability ("TTD") benefits for the period of December 22, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that Dr. Quackenbush is authorized to treat claimant for his industrial injury?

FINDINGS OF FACT

1. Claimant began working for employer in July 2013 as a field supervisor. Claimant testified at hearing that on December 20, 2014 he was working with employer in Douglas, Wyoming when he went to employer's yard to check with the crew he and his crew were relieving before heading to a gas station to get fuel for the company vehicle and snacks. Claimant testified that as he got back into the vehicle he hit his head on the roof of the car.

2. Claimant testified that after he hit his head, he knew he wasn't feeling right and became nauseous.

3. Claimant presented the testimony of Mr. Durham, a co-worker for employer. Mr. Durham testified he was with claimant when claimant struck his head. Mr. Durham testified claimant "rung his bell pretty good" when he hit his head on the vehicle. Mr. Durham testified claimant requested someone else drive the vehicle.

4. Mr. Durham testified claimant became very pale and was unstable while walking. Mr. Durham testified claimant began vomiting in the parking lot and Mr. Durham proceeded to take claimant to the emergency room ("ER").

5. The ER physician noted claimant presented after hitting his head. Claimant reported he was feeling dizzy and nauseated and the records document claimant was dry heaving on arrival. Claimant reported a prior history of a concussion a year earlier. Claimant was referred for a computed tomography ("CT") scan of his head. The CT scan showed no acute intracranial process. Claimant was provided medications and instructed to follow up with a physician in Grand Junction.

6. Claimant testified he had previously suffered a concussion in December 2013 when he fell off a ladder at home for which he sought treatment with Dr. Quackenbush, his personal physician. Dr. Quckenbush's records noted a slow recovery from the concussion throughout 2014. Claimant was referred to Dr. Gilman on January 13, 2014 for neurological evaluation. Dr. Gilman noted post-concussive syndrome and recommended some balance exercises. After being released to return to work without restrictions on February 28, 2014, claimant suffered a recurrence of his symptoms in March 2014 and was again taken off of work by Dr. Quackenbush on April 1, 2014. On May 8, 2014, Dr. Quackenbush noted claimant was still having both cognitive and physical affects of the concussion and referred claimant to physical medicine and rehabilitation to begin therapeutic interventions. Claimant returned to Dr. Gilman who noted claimant was not improving. Dr. Gilman recommended an EEG, which was normal. Claimant was eventually released to return to work by Dr. Quackenbush on August 29, 2014 on one week cycles. After completing 2 one week cycles, Dr. Quackenbush released him to return to work on two week cycles as of October 8, 2014.

7. In December 2014, Claimant returned to Grand Junction and was referred to Dr. Gustafson by employer. Claimant was initially evaluated by Dr. Gustafson on December 22, 2014. Dr. Gustafson noted that claimant reported complaints of a headache with nausea, vomiting, and dizziness. Dr. Gustafson diagnosed claimant with a concussion and recommended claimant remain off of work. Dr. Gustafson noted that claimant was going to follow up with his primary care physician, Dr. Quackenbush.

8. Dr. Quackenbush's notes indicate that claimant's wife called to schedule an appointment on December 22, 2014. Claimant was evaluated by Dr. Quackenbush on December 23, 2014. Claimant reported to Dr. Quackenbush that he was injured four days ago at work when he struck his head on a car at work. Dr. Quackenbush noted that claimant had a history of a prior concussion. Dr. Quackenbush recommended cognitive rest and noted claimant had plans to follow up with the workers' compensation doctor.

9. Claimant returned to Dr. Gustafson on December 29, 2014. Dr. Gustafson noted that claimant was referred to a neurologist, but did not want to treat with Dr. Gilman because he did not have a good experience with Dr. Gilman with his previous treatment. Dr. Gustafson recommended Dr. Burnbaum. Dr. Gustafson noted that he would defer medical management decisions to Dr. Quackenbush.

10. Claimant was examined by Dr. Burnbaum on January 13, 2015. Dr. Burnbaum noted that claimant had a basically unremarkable neurologic examination.

Dr. Burnbaum recommended Topamax and a topical anti-inflammatory Voltaren cream for the reported tenderness.

11. Claimant returned to Dr. Gustafson on January 22, 2015 and continued to complain of headaches. Dr. Gustafson noted claimant had undergone a neurological exam that was unremarkable. Dr. Gustafson noted that work activities had aggravated an underlying pre-existing condition. Claimant returned to Dr. Gustafson on January 29, 2015 with complaints of right sided head discomfort. Claimant reported continued problems with fatigue, concentration and speech.

12. Claimant was next evaluated by Dr. Burnbaum on February 20, 2015. Dr. Burnbaum noted claimant was doing better. Dr. Burnbaum increased his medications to 75 mg of Topamax.

13. Claimant returned to Dr. Burnbaum on May 28, 2015. Dr. Burnbaum noted that claimant got worse when he went up to higher altitude on the monument. Dr. Burnbaum recommended neuropsychological testing.

14. Claimant was referred for an independent medical examination ("IME") with Dr. Hammerberg on June 24, 2015. Dr. Hammerberg reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Hammerberg issued a report that indicated it was his opinion that claimant suffered an injury when he struck his head on the vehicle on December 20, 2014. Dr. Hammerberg testified at hearing in this matter that at the time of his initial evaluation, he agreed that claimant's treatment he had received was appropriate. Dr. Hammerberg testified at hearing that the original opinion was not based on objective data. Dr. Hammerberg recommended neuropsychological testing.

15. Claimant eventually underwent a neuropsychological IME with Dr. Kenneally. Dr. Kenneally performed the neuropsychological IME over the course of two days, June 25, 2015 and July 16, 2015. Dr. Kenneally opined, based on the neuropsychological IME that claimant was malingering.

16. Dr. Kenneally testified at hearing in this matter regarding her IME. Dr. Kenneally testified claimant failed four separate validity measures and noted in her testimony that failing 3 validity tests requires a diagnosis of malingering. Dr. Kenneally testified claimant was choosing to underreport his symptoms. Dr. Kenneally testified she did not disagree that claimant struck his head on a car door, but noted that the MRI scan and CT scan support a finding of no head injury.

17. Dr. Kenneally testified on cross examination that she could not state that claimant was malingering in January 2015, but that he was malingering when she evaluated claimant in June and July.

18. The ALJ finds that testimony of Dr. Kenneally and Dr. Hammerberg to be credible and persuasive. The ALJ finds that claimant is likely malingering in his presentation to Dr. Kenneally. The ALJ finds, however, that this does not necessarily support a finding that claimant did not suffer a compensable injury in December 2014.

19. The ALJ credits the testimony of Mr. Durham regarding claimant's injury in December 2014 and finds that claimant has proven that it is more likely than not that he sustained an injury arising out of and in the course of his employment with employer. The ALJ further credits the opinions of Dr. Gustafson regarding claimant's work restrictions and finds that claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning December 22, 2014.

20. The ALJ specifically finds claimant's testimony regarding the effects of the injury to be not credible. The ALJ, however, credits the medical records over claimant's testimony and the testimony of Dr. Hammerberg that the treatment provided prior to his IME was reasonable and finds claimant has proven that it is more likely than not that claimant's treatment was reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

21. The ALJ notes that he is without jurisdiction to determine that claimant has reached maximum medical improvement. Such an opinion must come from an authorized treating physician, such as Dr. Gustafson or another authorized provider. Despite a finding that claimant may be malingering with regard to his symptoms in the IME, this does not provide the ALJ with authority to cut off an award of TTD benefits or ongoing medical benefits. Again, this needs to be addressed by an authorized treating physician before it is addressed by the ALJ.

22. While respondents argue that claimant did not suffer a compensable injury in this case, the ALJ would need to ignore the testimony of Mr. Durham regarding what he witnessed on December 20, 2014 in order to make this finding. The evidence, when viewed as a whole, does establish that it is more likely than not that claimant sustained a compensable injury on December 20, 2014 that resulted in the need for medical treatment.

23. With regard to the reasonable and necessary medical treatment, the ALJ finds the treatment before the IME with Dr. Kenneally to be reasonable and necessary medical treatment. No medical treatment after the IME is currently at issue before the ALJ. Moreover, the ALJ is without jurisdiction to indicate that no further treatment would be reasonable and necessary as this represents a de facto finding of MMI without having the DIME process run its' course. However, the reasonableness and necessity of future medical treatment may always be raised by respondents and this Order does mean that future medical treatment is reasonable and necessary to cure and relieve the claimant from the effects of the injury.

24. The ALJ credits the testimony of Dr. Hammerberg in this regard that the treatment provided to claimant prior to his IME was reasonable medical treatment necessary to treat claimant's injury.

25. With regard to the treatment from Dr. Quackenbush, the ALJ finds that claimant made an appointment on his own with Dr. Quackenbush and was not referred for medical treatment from Dr. Gustafson with Dr. Quackenbush. Therefore, the ALJ

finds Dr. Quackenbush was not an authorized provider for treatment related to claimant's work injury.

26. The wage records entered into evidence establish that claimant earned $6,335.01 (including a "bonus" of $100.00) in the 8 weeks prior to this injury (time period of November 1, 2014 through December 26, 2014). This equates to an AWW of $791.88. The ALJ notes that this time period takes into consideration the time in which claimant was released to return to his two week shifts by Dr. Quackenbush prior to his December 20, 2014 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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer.

As found, the testimony of Mr. Durham in found to be credible and persuasive in this regard.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

6. As found, claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Gustafson and Dr. Burnbaum was reasonable and necessary to cure and relieve claimant from the effects of his injury.

7. As found, claimant has failed to prove by a preponderance of the evidence that Dr. Quackenbush is authorized to treat claimant for his injuries. As found, claimant at least had plans to make an appointment with Dr. Quackenbush before his treatment with Dr. Gustafson, the physician claimant was referred to by employer.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant has demonstrated that the injury resulted in work restrictions from Dr. Gustafson.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant's AWW for his work injury is determined to be $791.88.

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.

2. Respondents shall pay claimant TTD benefits commencing December 22, 2014 and continuing until terminated by law or statute.

3. Dr. Quackenbush is determined to be not an authorized provider.

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: September 17, 2015

Keith E. Mottram

_____

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

ISSUES

- Whether Claimant established by a preponderance of the evidence that he sustained a compensable head injury in the course and scope of his employment of December 5, 2014.

- Whether Claimant established by a preponderance of the evidence that he suffered compensable bilateral inguinal hernias in the course and scope of his employment on December 5, 2014.

- Whether Claimant established by a preponderance of the evidence that as a consequence of his December 5, 2014 accident he suffered a compensable groin injury in the form of an infected hematoma which subsequently formed an abscess requiring surgical debridement.

- If Claimant suffered compensable bilateral inguinal hernias a groin abscess and/or head injury, whether he is entitled to reasonable, necessary and related medical benefits to cure and relieve him from the effects of said compensable injuries.

- The issue of Average Weekly Wage was reserved by the parties pending determination of the compensable nature of the alleged injuries.

FINDINGS OF FACT

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

1. Claimant works for Employer as a service electrician. His job duties consist of driving a company van to various locations to perform repair and service work. The van is equipped with a top mounted ladder rack which holds two ladders, one 12 feet in length and the other 10 feet. Two additional ladders, a 6 foot and a 4 foot, are carried inside the van.

2. On December 5, 2014, Claimant was called out to Denver to inspect a faulty ceiling fan. Claimant needed the 12 foot ladder to reach and inspect the fan which he retrieved from the ladder rack by standing on a rung on either side of the 4 foot stepladder placed on the ground on the side of the van. Upon inspection, Claimant determined why the fan was not working. He then provided the customer with an estimate for the repairs necessary to return the fan to working order. The customer declined further service and Claimant then returned to his van with the 12 foot ladder in hand. In the process of returning the ladder to the top rack Claimant injured his head

and groin. Claimant explained that while standing on the 4 foot ladder while straddling the top rung with his legs had managed to secure the front end of the ladder to the rack. He testified that the rear end of the ladder was not secure and slide from the rack striking him in the head. Claimant reportedly lost his footing on the 4 foot ladder and fell groin first onto the top rung "racking" himself in the process. He reportedly caught himself from proceeding to the ground by swinging one foot over the ladder and onto the ground. He then stepped around to the backside of the van for some privacy while he tried to gather himself. Claimant testified that he experienced blurred vision, pain in his head, pain in his groin and a buckling sensation in his knees, following the aforementioned incident.

3. Claimant testified that he composed himself and despite being in pain was able to secure the back of the 12 foot ladder to the rack and place the 4 foot ladder back into his work van. He testified that he drove a short distance down the road, stopping to rest for about an hour before proceeding to his next call during which time his vision cleared. Although his blurred vision resolved, Claimant testified that his sharp groin pain persisted. After resting, Claimant drove to Castle Rock to complete a service call. Once he finished, Claimant returned to Colorado Springs where he completed an easy job, he described as changing light bulbs which completed his work day. Claimant testified he was still experiencing groin pain upon his return home. He took a shower and inspected his groin. He testified that he did not notice any swelling in the groin area but because his pain persisted and he was experiencing numbness and tingling in his arm, his wife took him to Urgent care where he complained of dizziness, headache, tingling in his limbs, and pain in his right groin. Given the nature of his symptoms, Claimant appears to have been internally transferred from the Urgent Care section of Memorial Hospital to the Hospital's Emergency Room (ER).

4. On presentation to the (ER) on the evening of December 5, 2015, Claimant again complained of headache, nausea and groin pain. The attending ER physician noted that Claimant's presentation was concerning for possible head injury. Consequently, he ordered a CT scan of the head. The CT scan of the head was negative. Concerning Claimant's groin pain, the physician obtained the following history of present illness (HPI): "He also states right groin swelling. This has been going on for the past two days. Thinks he has an abscess there. He states pain, a little swelling. No history of MRSA or other skin abscesses. States that it hurts really bad especially when he pushes on it."

5. Inspection of the upper right thigh revealed a 5cm × 5cm area of induration/swelling, which the ER physician opined was possibly an early abscess, along with "some skin changes consistent with chronic skin irritation" just posterior to the scrotum. As the area felt indurated, the ER physician opined that the lesion appeared "chronic" leading the ER physician to note the need to initiate antibiotics. Claimant was diagnosed with a furuncle and prescribed pain medication, anti-inflammatory medication, anti-nausea medication and an antibiotic. He was discharged home with instructions to return to the ER for additional care should he experience worsening symptoms. Upon his discharge Claimant was provided patient

information/documentation regarding the nature and cause of abscess which provided as follows: "an abscess is an area under the skin where pus (infected fluid) collects. An abscess is often caused by bacteria. You can get an abscess anywhere on your body."

6. Per his discharge instructions, Claimant returned to the ER at Memorial Hospital on December 7, 2015, complaining of increasing swelling and pain in the groin. A report generated by Dr. Tanner Tollett, and later reviewed by Dr. Larry Butler, from Claimants initial presentation to the ER on this date reflects that Claimant had been seen in the ER previously, i.e. December 5, 2014 at which time examination failed to reveal "evidence for any acute traumatic injury."

7. Further ER evaluation on December 7, 2014 included multiple consultations, diagnostic testing and laboratory workup. Laboratory testing revealed an elevated blood sugar over 300 and blood work suggestive of infection consistent with an extending cellulitis and abscess in the right groin. Claimant was admitted to the hospital under the care of Dr. Tollett. (Respondents' Exhibit B, p. 129). Dr. William Kimball was consulted regarding Claimant's groin pain and swelling. Dr. Kimball examined the groin noting that Claimant had a "lot of cellulitis" and what felt like an "abscess inferior to the right inguinal ligament." He recommended incision and drainage (I & D) of the abscess and he performed the same at approximately 4:41 PM, December 7, 2014. (Respondents' Exhibit B, p. 129, 130 & 134-35). A note, which the undersigned ALJ ascribes to Dr. Kimball, likely prepared on December 7, 2014 at 4:41 PM following the I & D contains the following regarding the cause of Claimant's groin abscess: "I recommended I and D and when that was done it was mostly blood that came from beneath the skin with a little trickle of yellow purulent fluid in the blood, so it appeared to me that it was an infected hematoma secondary to that injury he sustained when he fell off a ladder." (Respondents' Exhibit B, p. 129-30).

8. Multiple CT scans were obtained during Claimant's diagnostic workup in the ER on December 7, 2015. A CT scan of the lumbar spine showed no acute traumatic injuries, but did demonstrate multiple cystic lesions in the right ileum which was felt to represent "a benign process." (Respondents' Hearing Exhibit B, p. 133). CT scan of the cervical spine demonstrated no acute injury. (Respondents' Hearing Exhibit B, p. 132-33). Most importantly, regarding the cause of Claimant's groin abscess, CT scan of the abdomen and pelvis demonstrated inflammatory changes in the medial aspect of the right thigh only. There was no evidence of focal soft tissue mass lesions or lymphadenopathy or fluid collection. (Respondents' Hearing Exhibit B, p. 133).

9. By record dated 12/7/2014 at 11:23 PM, Dr. Tollett noted Claimant to be a morbidly obese man with newly diagnosed diabetes. Abdominal examination was limited secondary to obesity. Concerning Claimant's abscess, Dr. Tollett noted that it was "likely caused by an infected furuncle, possibly exacerbated by recent trauma, but most likely, he is susceptible secondary to problem #2" (documented in his report to be Claimant's newly diagnosed diabetes)(Respondents' Exhibit B, p. 144).

10. On December 9, 2014 while hospitalized and preparing to undergo a

bedside dressing change for his abscess wound following the previous I & D, Claimant expressed extreme pain prompting the need to take a "second look to ensure no residual infection" was contributing to Claimant's ongoing pain. Accordingly, Claimant was taken to the operating room (OR) by Dr. Larry Butler. Once in the OR, Dr. Butler performed additional excision and debridement of a 5 × 3 cm right groin abscess under general anesthesia.

11. Claimant was discharged from the hospital on December 12, 2014. He received home health care services for dressing changes and post-operative care.

12. Medical records from Memorial Hospital establish that Claimant was seen in follow-up for his abscess by Dr. Butler on January 20, 2015. Dr. Butler's medical record from this date documents a second impression of "Inguinal hernia." Although Claimant testified that he was told during his hospital stay that he had bilateral hernias that required repair, the aforementioned note of Dr. Butler from January 20, 2015 is the first reference that the ALJ finds to Claimant having inguinal hernias in the medical records submitted as evidence in this case. Nonetheless, Dr. Butler's surgical note from March 10, 2015, during which time Claimant's hernias were repaired, notes that while Claimant was being treated for his right inner thigh abscess, he was "worked up with CT that demonstrated bilateral inguinal hernias." Consequently, the ALJ finds, more probably than not, that Claimant's bilateral inguinal hernias were discovered sometime during his hospitalization between December 7-12, 2014. Dr. Butler does not comment as to a cause of Claimant's hernias outside of listing obesity as a predisposing factor for the development of the same.

13. Dr. Allison Fall examined Claimant at Respondents' request on February 26, 2015. She was called to testify at hearing being qualified as a Board Certified Physical Medicine and Rehabilitation specialist who is also Level II Accredited by the Division of Workers Compensation.

14. Dr. Fall testified that it was her opinion, to a within reasonable degree of medical probability, that Claimant did not suffer any ongoing or significant injury to his head. The ALJ finds this testimony supported by the medical records from Claimant's visit to the ER on December 5, 2014 and December 7, 2014.

15. Dr. Fall testified that it was her opinion, within a reasonable degree of medical probability, that Claimant's mechanism of injury, as testified to by Claimant and as documented in the medical records, did not cause Claimant's inner thigh abscess and infection. According to Dr. Fall the report concerning the abscess dated December 5, 2015 report described the lesion as "indurated," meaning that the skin sinks down, and "chronic," meaning that it had been there for awhile. This would comport with Claimant's statements that he had right groin swelling that had been going on for the "past two days."

16. Dr. Fall testified that the mechanism of injury described by Claimant and reported in the medical records, could not have caused, aggravated or accelerated the

abscess/infection that was documented when Claimant was seen in the Emergency Department on December 5, 2015. She testified that infections are not changed or affected by a contusion or trauma to an area. Instead, she testified that they are due to bacteria.

17. Dr. Fall testified that there were chronic findings associated with the abscess discovered during the December 5, 2015 examination. Moreover, the record indicates that the process had advanced sufficiently that one of the recommended treatments was to initiate antibiotics. She testified that there was no prior documentation of a hematoma in the right thigh and no hematoma was revealed on CT scan. According to Dr. Fall, Claimant has risk factors, for developing infections, including diabetes and obesity.

18. The ALJ credits opinion of Dr. Tollett and the testimony of Dr. Fall to find that Claimant's abscess was, more probably than not caused by an infected furuncle which he is susceptible to developing due to his diabetes and obesity and not his fall onto the stepladder as he claims. The persuasive evidence, including Claimant's statements, the results of his physical examination on December 5, 2014, the results of his diagnostic testing on December 7, 2014 and the time line supports a finding that Claimant, likely developed a inner thigh boil a couple of days before he fell. While the fall likely resulted in the placement of extreme pressure to the affected area and subsequent pain in the groin, it did not cause the boil or subsequent infection. Based upon the totality of the evidence presented, the ALJ finds Dr. Kimball's suggestion that the abscess was caused by an infected hematoma unconvincing.

19. Claimant has failed to establish a causal connection between his work related fall and the development of his inner thigh abscess and subsequent infection requiring I & D and hospitalization.

20. Dr. Fall testified that Claimant's bilateral inguinal hernias were not caused by the December 5, 2015 incident. In support of her opinion, Dr. Fall noted the lack of medical documentation referencing any symptomatic complaints by Claimant consistent with an inguinal hernia at the time Claimant presented for treatment in the ER on December 5 or 7, 2014. Moreover, Dr. Fall testified that the mechanism of injury (MOI) as described by Claimant is not likely to cause or aggravate an inguinal hernia. According to Dr. Fall's uncontroverted testimony, the primary cause of inguinal hernias comes from increased pressure on the contents of the abdominal cavity associated with forceful Valsalva maneuvers rather than from falling or hitting something externally. Consequently, Dr. Fall testified that abdominal girth plays a role in the development of inguinal hernias and Claimant's obesity likely precipitated the development of the hernias discovered while he was hospitalized in this case. The ALJ finds the opinions of Dr. Fall credible, persuasive and in line with that of Dr. Butler who failed to comment on the cause of Claimant's hernias other than to indicate that his obesity predisposed him to development of the same.

21. Claimant has failed to establish a causal connection between his work

related fall and his bilateral inguinal hernias requiring surgical repair.

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 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).* 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. Claimant has failed to prove, by a preponderance of the evidence that he suffered a compensable head injury, groin abscess/infection or compensable bilateral inguinal hernias on December 5, 2014 when he fell onto his 4 foot stepladder, "racking" himself in the process. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-*

301(1), C.R.S.; Horodyskyj v. Karanian 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's injuries arise out of his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between employment and the alleged injuries. Section 8-43-201, C.R.S. 2013.

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). While Claimant likely was struck in the head struck by a ladder causing him to fall onto the stepladder upon which he was standing, he did not sustain work-related injuries requiring medical treatment. Although Claimant may have reported a head injury and headache, he presented to the ER for treatment associated with his groin pain. In fact, Claimant presented to Urgent Care and then to the Emergency Department with a headache, rated 2/10 on a pain scale. Prior to seeking medical treatment, he had continued to work. His brain and cervical spine CT scans were negative and his visual disturbances had resolved by the time he was treated on December 5, 2015. Accordingly, the finds that the lack of objective findings supports the testimony of Dr. Fall that the Claimant did not suffer any significant injury to his head necessitating treatment.

G. Based upon the evidence presented, the ALJ concludes that Claimant's groin abscess/infection was, probably caused by an infected furuncle which he is susceptible to developing due to his diabetes and obesity and not his fall onto the stepladder as he claims. The persuasive evidence establishes that Claimant presented to the ER with a chronic, indurated boil which appeared infected leading to the recommendation to initiate antibiotics. More likely than not, the infection process had already begun prior to

his fall which only brought additional attention to the area secondary to Claimant's reports of persistent pain. The medical records from December 5, 2015 do not document that there was evidence of traumatic or acute injury to the groin; however, they do document an indurated furuncle. Furthermore, there was no documentation of any hematoma on examination or borne out by substantial diagnostic testing on December 5 or 7, 2014. Consequently, the ALJ rejects Dr. Kimball's theory that the abscess was caused by an infected hematoma from Claimant's fall for the more persuasive opinions of Dr. Tollett and Dr. Fall, that Claimant's abscess was caused by an infected boil which he is at risk for developing as a consequence of his diabetes and obesity. Consequently, Claimant has failed to establish a causal connection between his work related fall and his abscess and infection requiring I & D with subsequent hospitalization.

H. As found, the ALJ concludes that Claimant has failed to establish a sufficient causal connection between his fall and his bilateral inguinal hernias. Here, the persuasive evidence establishes that Claimant's hernias were not caused by the December 5, 2015 incident as evidenced by the lack of medical documentation referencing any symptomatic complaints by Claimant consistent with an inguinal hernia at the time Claimant presented for treatment in the ER on December 5 or 7, 2014 and a described MOI unlikely to caused inguinal hernias. As found, the ALJ credits the testimony of Dr. Fall, when read in conjunction with Dr. Butler's March 10, 2015 operative report to conclude that Claimant's obesity (abdominal girth) is the precipitating cause of the "very small inguinal hernias" discovered and repaired by Dr. Butler, rather than his fall onto the stepladder on December 5, 2014.

I. Because Claimant had failed to carry his burden to establish that he sustained a compensable injury, his remaining claims regarding entitlement to medical and lost wage benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits arising out of the December 5, 2014 incidnet involving his ladders 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: __September 15, 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 an occupational disease or injury to his bilateral hands, mouth, throat, or groin/hernia.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits.

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

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer full time beginning in approximately 2008 as a baker. Claimant worked daily from 7:00 p.m. to 6:00 a.m. and earned an annual salary of $20,800.

2. Claimant's job duties included cleaning and sanitizing the kitchen, doing dishes, and preparing food items for the morning. Claimant cut and chopped food and fried donuts. Claimant also maintained the oil fryer machine.

3. In September of 2014 Claimant noticed lacerations below his thumb nails. Claimant used hand cream and liquid band aids on his lacerations.

4. Sometime in September or October of 2014 Claimant also noticed burns on his hands that were dime sized and peeling. Claimant initially believed his burns were caused by the frying oil, but then came to the conclusion that they were caused by dishwashing detergent soap used in the industrial dishwasher in Employer's kitchen.

5. Employer has an industrial dishwasher in the kitchen. The dishwashing detergent soap is in a large jug on the floor beneath a large sink basin. The soap is attached to the dishwasher by tube. The Claimant would load the dishwasher with dirty dishes, close the door, and press the button to run the load through. The machine would automatically inject through the tubing an amount of soap during the wash cycle. The dishwasher also would run sanitizer through the machine after the wash cycle with and the sanitizer was also stored in a large jug on the floor and attached by tube to the machine. Finally, the dishwasher would perform a rinse cycle with water. The entire cycle to run a load took between three and five minutes. After the cycle is complete, Claimant opened the door and would move the clean dishes out of the machine. When

the door was opened water would still be dripping inside the machine and dish items would still be wet. Claimant's hands would thus get wet while moving the dishes out of the machine.

6. Claimant never had a reaction to the dishwashing detergent soap from 2008 until late 2014. No other employees had a reaction to or problem with the dishwashing detergent soap.

7. A fellow employee recommended using vinegar on his peeling burns and Claimant began using vinegar on his hands in October of 2014. Any time Claimant felt a burning sensation or believed he had come into contact with the dishwashing detergent soap Claimant scrubbed his hands vigorously and poured undiluted vinegar on his hands until he felt a burning sensation. Claimant scrubbed his hands with an old soft bristle scrub brush that was in Employer's kitchen. Claimant believed he had an allergy to the dishwashing detergent soap and that by scrubbing his hands and pouring vinegar on his hands until he felt a burning sensation, he was resolving the allergy.

8. In October, Employer began having other employees perform the dishwashing duties and Claimant no longer used dishwasher.

9. Sometime in November of 2014 Claimant felt water splash the right side of his face and he felt immediate burning in his eyes. Claimant believed that the dishwashing detergent soap had gotten into his right eye and he poured vinegar into his right eye to alleviate the burning.

10. Claimant continued his routine of scrubbing his hands with undiluted vinegar from October through the end of December of 2014 at the end of his shift and any time he felt a burning sensation. He kept a cup of undiluted vinegar next to the sink in Employer's kitchen for this purpose.

11. On January 1, 2015 Claimant was slicing ham in the kitchen. The ham was on a tray that had been washed by Employer's dishwasher. While slicing ham and preparing food in the kitchen, Claimant routinely "grazed" on food and took small bites. On this date, Claimant ate a few bites of ham. Claimant alleges he felt an immediate burning sensation in his throat.

12. Claimant immediately gargled and scrubbed the inside of his mouth and throat with undiluted vinegar.

13. Claimant continued to use undiluted vinegar to scrub the inside of his mouth and throat and believed that the dishwashing detergent soap residue on the tray the ham was on caused blisters and sores in his mouth. Claimant began daily scrubbing of his mouth vigorously to the point of gagging and causing pieces of the interior surface of his mouth to come out.

14. On January 5, 2015 Claimant was evaluated at the emergency department of the VA hospital. Claimant reported to emergency nurse practitioner (NP) Tyler Schmidt and emergency NP Theresa Tomlin that he had a long history of work related burns to the bilateral forearms from a chemical dishwasher. Claimant reported having chemical burns to his hands, arms, and mouth for the **last several years**. *See* Exhibit H.

15. Claimant reported extensive health concerns related to work chemicals and reported he had been telling Employer about his concerns. The NPs evaluating Claimant noted he had red spots on his arms and a scabbed area to the right hand near the base of his thumb. It was noted on examination that Claimant had bilateral hand erythema and one healing wound to his right hand. Claimant was discharged from the emergency department with instructions to follow up with workers' compensation. *See* Exhibit H.

16. Claimant returned to work and worked until January 12, 2015 when he went to the emergency room. Claimant has not worked for Employer since January 12, 2015.

17. On January 12, 2015 Claimant was evaluated at the emergency department of St. Anthony Summit Medical Center by Marc Doucette, M.D. Claimant reported blistering in his throat, that his throat was closing, and that his voice was hoarse due to cleaning detergents he used at work. On examination Dr. Doucette noted that Claimant had some erythema of the tonsillar pillars but no blistering, no exudates, and no asymmetric swelling. Dr. Doucette noted that Claimant's airway was widely patent. Dr. Doucette noted that both of Claimant's hands over the dorsum had some healing lesions with no active or open sores, cuts, or evidence of infection or cellulitis. Dr. Doucette noted that Claimant had photos on an iphone showing ulcerative lesions of the throat that seemed to have healed but that Claimant had ongoing concerns that his problems were caused by work exposure. Dr. Doucette opined that Claimant should be evaluated by the workers compensation clinic, CCOM, for further management of his concerns and that he had no treatment options to offer in the emergency room. *See* Exhibit E.

18. On January 12, 2015 Claimant was evaluated at CCOM by Deborah Zimmerman, P.A.-C. Claimant reported burns on his hands with severe symptoms of burning and aching. Claimant reported the problem began on October 1, 2014 and that his pain level was 10/10. Claimant reported his pain was improved with vinegar and that he used vinegar to neutralize the pain. Claimant reported a rash in both eyes with blurred vision and seeing double since he splashed water from the dishwasher into his eyes. Claimant also reported burning pain in his tongue with blisters and that the pain was starting to move down his throat where he could not treat it himself with vinegar. PA Zimmerman diagnosed contact dermatitis and noted that the rash on Claimant's arms was consistent with contact dermatitis from chemicals and/or excessive exposure to water. She opined that the mouth and tongue symptoms were less clear but that a daily exposure for over one year put Claimant at risk for developing hypersensitivity.

She recommended Claimant discontinue using vinegar and/or abrasive methods in the mouth. *See* Exhibit C.

19. On January 16, 2015 Claimant was evaluated at CCOM by PA Zimmerman. Claimant again reported a pain level of 10/10. Claimant reported that vanicream had helped his hands not to feel so dry and chapped but that it did nothing for the pain inside his bones. Claimant reported he continued to have sores in his throat and was now feeling as if his throat was closing up. On examination PA Zimmerman noted that Claimant was sitting comfortably in no acute distress, continued to talk nonstop, but was alert, oriented, and appropriate. PA Zimmerman diagnosed contact dermatitis, asthma, and stomatitis and opined that further testing would be required before determining causation. *See* Exhibit C.

20. On January 16, 2015 Claimant was evaluated at the emergency department of St. Anthony Summit Medical Center by Kathryn Reaney, PA-C. PA Reaney noted Claimant was evaluated at CCOM earlier and was sent to them with concerns for Steven Johnson's syndrome. Claimant reported 10/10 pain levels, wheezing, and ulcers under his tongue and in his mouth. Claimant reported he had been treating ulcers in his mouth with vinegar. PA Reaney noted on examination that claimant had mild aphalous ulcers under the tongue and had no signs of Stevens-Johnson syndrome. Claimant was given an albuteral nebulizer treatment and 10 mg of decadron. After the nebulizer treatment, Claimant's reported wheezing was much improved and he was discharged. *See* Exhibit E.

21. On January 19, 2015 Claimant was evaluated at CCOM by PA Zimmerman. Claimant continued to report constant severe burning in his hands, swelling in his tongue and throat, pain in his eyes, and intense sore burning in his tongue. Claimant reported 10/10 pain, that he had ringing in his ears, headaches, pain in his stomach, no sense of taste, and that he got nauseous when eating. Claimant reported he was using his toothbrush soaked in vinegar on his tongue and in the back of his throat. *See* Exhibit C.

22. On January 22, 2015 Claimant was evaluated at CCOM by Robert Dixon, M.D. Dr. Dixon noted that Claimant had returned for a recheck of his burns/sores on his hands, forearms, and mouth with no change. Dr. Dixon noted the cause of Claimant's problem was not known at this time and that a dermatologic consultation was needed to help determine causality, diagnosis, and treatment. *See* Exhibit C.

23. On February 3, 2015 Claimant was evaluated by Paul Grant, M.D. at Advanced Dermatology. Claimant reported rash/irritated wounds on his hands, eyes, and in his mouth that was blistering, burning, and red. Claimant reported the irritation started on his hands in October, in his eyes in November, and in his throat in December. Claimant reported his belief that there was a direct association of his problems with exposure to Employer's dishwashing machine. Dr. Grant's impression included seborrheic keratoses (benign warty growth-age related), actinic keratoses (precancerous proliferations due to sun damage), and dermatitis unspecified. Dr. Grant

noted that the dermatitis had improved greatly per Claimant's reports. Dr. Grant noted that Claimant had only post-inflammatory hyper pigmentation and that there was distribution on the right proximal medial posterior thigh and right buttock. Dr. Grant noted that Claimant had no visible oral lesions. Dr. Grant opined that contact dermatitis could persist for several weeks before fully resolving. *See* Exhibit F.

24. On February 12, 2015 Claimant was evaluated at CCOM by Dr. Dixon. Claimant reported his pain was not improving and that his hands were splitting even though he had been using prescription cream. Claimant reported pain on the inside of his hands all the time and that the scabs and sores on the thumbs were at least 6 months old. Dr. Dixon noted that several of the lesions were keratoses but that Claimant seemed convinced they were work related. Dr. Dixon again opined that the cause of Claimant's problems were not known and recommended continued care with a dermatologist and referred Claimant to an ENT to determine if there was an actual disease and whether or not it would be work related. *See* Exhibit C.

25. On March 18, 2015 Claimant was evaluated at Aspen Ridge ENT- Summit by Christopher Mawn, M.D. Claimant reported a chemical reaction at work after washing and drying dishes with burns up and down his hands and arms. Claimant also reported eating a piece of ham that was on a tray that had been washed and dried with the chemicals and that his lips, tongue, and throat broke out in blisters. Claimant reported that as long as he stayed away from the detergent that washed equipment in the kitchen he did not have a problem. Dr. Mawn noted that he did not know what Claimant's diagnosis was but would do a workup for mucositis. *See* Exhibit D.

26. On March 19, 2015 Claimant was evaluated at CCOM by Brian McIntyre, D.O. Dr. McIntyre noted Claimant's reports of severe burning and aching in the hands with a 10/10 pain level. Dr. McIntyre noted that Claimant saw the ENT the day prior but that he had not reviewed notes from the ENT yet. Dr. McIntyre noted that the cause of Claimant's problem was not yet known. Dr. McIntyre opined that Claimant's reported pain was way out of proportion to his examination and demeanor. Dr. McIntyre noted that Claimant's work exposure had stopped over two months prior and noted concern with the work relatedness of Claimant's continued symptoms. Dr. McIntyre noted that he would support continued treatment and recommendations by both ENT and dermatology but envisioned Claimant would be at MMI imminently without permanent impairment. *See* Exhibit C.

27. On March 31, 2015 Claimant was evaluated again by Dr. Grant at Advanced Dermatology. Dr. Grant noted Claimant was following up for dermatitis unspecified on the right buttock. Dr. Grant provided the impression of right distal thumb fissure that had resolved, inflamed seborrheic keratoses, and dermatitis unspecified. Dr. Grant noted that seborrheic keratoses can become inflamed, itchy, tender, traumatized, caught on clothing, or could exhibit bleeding or crusting. Dr. Grant noted Claimant was seeing an ENT doctor for the intraoral problems. Dr. Grant noted the distribution of dermatitis was on the left hand, left forearm, right hand, right forearm, left cheek, and right buttock. *See* Exhibit F.

28. On April 1, 2015 Claimant was again evaluated by ENT Dr. Mawn. Dr. Mawn reported Claimant had improved slightly. Dr. Mawn opined that Claimant had vitamin D deficiency but he found no underlying inflammatory disorders. Dr. Mawn was unsure whether eating meat from a pan with chemicals on it could have caused Claimant's oral inflammation and recommended referral to an allergist for contact testing. *See* Exhibit D.

29. On April 3, 2015 Claimant was evaluated at CCOM by Dr. McIntyre. Claimant continued reporting 10/10 pain. Dr. McIntyre stated that he was honestly not sure what to make of Claimant's reports of pain and believed Claimant didn't understand what 10/10 pain 100% of the time was even after discussing the pain scale with Claimant. Dr. McIntyre again noted that Claimant had ceased work on January 1, 2015 and that the sequelae of symptoms were out of proportion. Dr. McIntyre also noted that Claimant had been an employee of Employer for many years without known exposure complaints. Dr. McIntyre noted his reliance on ENT and dermatology for treatment and noted the diagnosis of contact dermatitis from chemical products, and allergy with an unknown source of chemical sensitivity. Dr. McIntyre noted that the cause of the problem appeared to be, in part, related to work activities. *See* Exhibit C.

30. On April 28, 2015 Claimant was evaluated by Sarah Christensen, PA-C and Matthew Bodish, M.D at the Storms Allergy Clinic. Claimant reported a significant rash following the use of soap/detergent at his former place of employment. Claimant reported a rash from his elbow down that was so deep it went to the bone. Claimant reported suffering from blisters and swelling in his mouth and posterior pharynx after eating food that was prepared in the kitchen. Claimant reported the only alleviating factor for the rash was a vinegar wash and scrubbing his skin vigorously, and that the vinegar was also helpful for the blisters in his mouth and throat. Patches were applied to Claimant's back and he was instructed to return in 48 hours for a patch test read. It was noted that Claimant had a history of seeking out medical advice without any resolution of his symptoms. Claimant refused an offer of antihistamines and medications for asthma. *See* Exhibit G.

31. On April 30, 3015 Claimant returned to Storms Allergy Clinic for follow up of his patch test and was evaluated by Jill Smothers, NP. It was noted that Claimant had contact dermatitis that he believed was related to dish detergent. PA Smothers opined that the patch test showed a positive reaction to #37 fragrance mix II, and to #70 carmine. PA Smothers noted she had a long conversation with Claimant regarding his skin test and that Claimant did not believe he was allergic to any chemicals, but that he had become sensitized to dishwashing detergent. Claimant reported that the only way he ever got relief was by scrubbing his skin vigorously, then pouring white vinegar on his skin until he felt it burning. Claimant reported once it reached the burning state, he felt the allergy had been resolved. Claimant reported he would not take any medication to control the symptoms even though PA Smothers recommended antihistamines and leukotriene modifies to try and block the allergen. *See* Exhibit G.

32. Claimant was provided handouts on information related to his positive results. For Claimant's fragrance mix II allergy it was noted he had a strong positive result and that his allergy might cause his skin to react when exposed to the substance. Typical symptoms of exposure included redness, swelling, itching, and fluid-filled blisters. It was noted that fragrance mix II was in many products including: aftershaves, baby products, bath oils, breath mints, candy, colognes, cosmetics, dental cements, detergents, dryer sheets, fabric softener, foods, hair care, household cleaners, hygiene products, ice cream, impression materials, laundry products, lotions/creams, medicaments, mouthwash, perfumes, skin care, soap, soft drinks, and tonics. For Claimant's carmine allergy it was noted that the contact allergy could cause his skin to react with typical symptoms including redness, swelling, itching, and fluid-filled blisters. It was noted that carmine is found in cosmetics, paints, artificial flowers, and added to food products to dye them. *See* Exhibit G.

33. Claimant regularly uses multiple products containing fragrance mix II including body soap, dish soap, deodorant, shampoo, toothpaste, and he consumes food and soda regularly that likely contains either fragrance mix II or carmine.

34. On May 7, 2015 Claimant was evaluated at CCOM by Dr. McIntyre. Claimant reported wanting to use vinegar as part of his treatment regime to scrub his palate/throat. Dr. McIntyre recommended Claimant ask the ENT about this treatment. Dr. McIntyre again noted his concern with exacerbation of symptomatology. Dr. McIntyre noted Claimant had reacted to fragrance mix II and carmine at an allergist visit and that Claimant refused medicine/moisturizer/soak treatment. Dr. McIntyre again noted that Claimant had been removed from work exposure for months with treatment by an ENT and that Claimant still reported no improvement. Claimant reported that his own home remedy of scrubbing the affected area and rinsing with white vinegar was the only thing that worked. *See* Exhibit C.

35. On May 28, 2015 Claimant was evaluated by Dr. McIntyre. Claimant continued to report painful hands, grossly constant, with worsening symptoms. Claimant reported that he was not using any medicine or vinegar now on his hands. Dr. McIntyre again noted his concern with symptom amplification, and noted that he was perplexed by Claimants' continued symptomatology. Claimant felt that with further allergy testing it was imperative to have distilled white vinegar present. *See* Exhibit C.

36. On June 12, 2015 Claimant was evaluated by Kathryn Blair, NP at Storms Allergy Clinic. NP Blair noted that after a patch test to liquid dishwasher detergent soap, Claimant displayed a severe positive reaction with ulceration and irritant reaction. *See* Exhibit G.

37. On June 15, 2015 Claimant was evaluated at CCOM by PA Zimmerman. Claimant reported skin testing on June 10, 2015 and that he had a severe reaction and was concerned for infection. Claimant requested multiple times to apply white vinegar to the wound to neutralize it. Claimant was noted on examination to have a 1 cm by 1 cm square lesion with scabbing and black necrotic tissue. PA Zimmerman diagnosed

chemical burn. Claimant repeatedly talked about his concern that the wound would progress deeper into his skin and potentially eat its way through his body or damage his spine. *See* Exhibit C.

38. On June 16, 2015 Claimant was evaluated at CCOM by Dr. McIntyre. Dr. McIntyre noted Claimant's allergy testing showed severe positive reaction to dishwasher detergent soap. Dr. McIntyre recommended an urgent dermatology referral for the chemical burn. Dr. McIntyre opined that Claimant had not progressed much in ascribed symptomatology or with treatment provided by specialists. Dr. McIntyre noted he was not well versed in the use of vinegar for these types of allergic reactions, but that Claimant was confident it provided benefit and that Claimant would discuss his idea of using vinegar with dermatology. *See* Exhibit C.

39. On June 23, 2015 Claimant was evaluated by Rayanne Harris, NP. Claimant reported seeing an ENT last week and being given an okay to use distilled white vinegar in his mouth. Claimant reported starting the oral treatment Saturday and using a toothbrush to scrub his throat and affected oral mucosa with vinegar. Claimant reported while doing this treatment, he suffered gagging and vomiting which caused him right lower abdominal/groin pain and swelling. Claimant reported the pain recurred when coughing. *See* Exhibit C.

40. On July 2, 2015 Claimant was evaluated by Dr. McIntyre. Claimant reported that he had continued pain and swelling of the right inguinal region from hacking/vomiting after self treatment of his throat with vinegar. Claimant reported that if he needed surgical care for a right inguinal hernia he was afraid of a staph infection and would want the surgery performed at the VA. Claimant continued to report severe throbbing and pulsating in his back, throat, and hands. *See* Exhibit C.

41. On July 7, 2015 Claimant was evaluated by Dr. Grant at Advanced Dermatology. Dr. Grant noted visual evidence of a strongly reactive patch test that was as strong of a positive patch test as he had ever seen. Claimant reported to Dr. Grant that after the patch test he started to get blisters in his mouth and down his throat. Dr. Grant opined that Claimant had one of the most severe allergic reactions he had seen in thirty-plus years of practice and that Claimant's case was one of the most dramatic and perplexing cases he had ever seen. *See* Exhibit F.

42. On July 9, 2015 Claimant was evaluated by Dr. McIntyre. Dr. McIntyre noted Claimant had an ultrasound that showed a right inguinal hernia. Claimant reported continued symptoms in his mouth and upper throat and reported symptoms continuing throughout the lower throat and into the abdomen. Dr. McIntyre noted concerns with the causation and relatedness of the right inguinal hernia. Dr. McIntyre noted Claimant had been self treating his throat with vinegar and with aggressive scrubbing which caused coughing/hacking/straining and Claimant reported the pain/bulge developed thereafter. Dr. McIntyre opined that it was possible that the hernia occurred with coughing/hacking/straining, but not medically probable. Dr.

McIntyre reiterated that Claimant's case was quite involved and complicated and looked forward to an IME providing further opinions. *See* Exhibit C.

43. On July 10, 2015 Claimant was evaluated by NP Blair at Storms Allergy Clinic. Claimant wanted someone to definitively say that his skin reactions, chronic throat pain, and chronic hand and arm pain were due to the chemical dishwasher detergent soap. NP Blair was unable to do so or to clearly define boundaries for chemical exposure but advised Claimant to avoid the dishwasher soap. *See* Exhibit G.

44. On July 16, 2015 Claimant was evaluated by ENT Dr. Mawn. Dr. Mawn noted that Claimant's dermatitis was proven to be from the work detergent by patch testing. Dr. Mawn opined thus that Claimant's mucositis was secondary to his chemical exposure as it coincided with his dermatitis and was consistent with inflammation often found in a systemic reaction. *See* Exhibit D.

45. On July 19, 2015 Claimant underwent a psychiatric independent medical examination performed by Robert Kleinman, M.D. Claimant reported to Dr. Kleinman that he first noticed what he thought were burn marks while at work. Claimant first thought the burns were from hot oil from frying donuts. However, as he continued to perform work activities no longer involving the fryer, his pain intensified and he began to think it was something else and it occurred to him that it must be the dishwasher solution. Claimant reported the burns on his hands spread down his arms and were now on his hands, arms, mouth, throat, and eyes. Claimant reported his mouth and throat were affected when he was slicing ham and ate a piece off of a tray that had been washed in the dishwasher. Claimant reported the tray must have contained residual dishwasher solution. Claimant reported that as soon as he ate the ham he had a sharp pain and burning in his throat. Because of the burning in his throat, Claimant quickly splashed about half an ounce of vinegar in his mouth and vigorously scraped his tongue and mouth with his finger. Claimant reported that he continued to treat the burning in his mouth by using vinegar to brush his teeth, scrub his tongue, and scrub the back of his throat with a toothbrush. Claimant reported scrubbing the back of his mouth and throat with the toothbrush and vinegar so aggressively to the point where "meat" came from the back of his throat and caused him to gag. *See* Exhibit B.

46. Claimant reported to Dr. Kleinman that he had a hernia from the gagging after vigorously scrubbing the back of his mouth with vinegar. Claimant also reported that while unloading the dishwasher, something splashed on the right side of his face and must have splashed into his right eye. Claimant reported treating his right eye by putting vinegar in it. Claimant also reported that between January and June of 2015 his hands and arms did not get better. *See* Exhibit B.

47. Dr. Kleinman noted that Claimant's explanation of his eye irritation was an unlikely scenario, since unloading a dishwasher would not have a significant amount of dishwasher detergent soap but that Claimant had fixated on using vinegar in his eye. Dr. Kleinman noted the positive patch test for the dishwasher detergent soap, but opined that it did not explain all of Claimant's symptoms or problems nor did it explain

his mouth, throat, groin, or eye problems. Dr. Medlin noted Claimant's report that the patch test was so severe it was digging through his skin and going almost to his spine was either grossly exaggerated, or Claimant's belief. *See* Exhibit B.

48. Dr. Kleinman opined that there was almost a delusional quality to Claimant's somatic complaints. He noted that Claimant had a firm fixed belief that everything that had been wrong since the end of 2014 was due to the dishwasher solution and that Claimant was not likely to relinquish his belief despite medical evidence to the contrary. Dr. Kleinman noted that Claimant did not use recognized medical treatment and used vinegar excessively. Dr. Kleinman diagnosed unspecified somatic symptom and related disorder, rule out obsessive compulsive disorder, and rule out obsessive compulsive personality. Dr. Kleinman opined that Claimant's psychiatric diagnosis was not related to what Claimant believed was an industrial injury. Dr. Kleinman noted that it had to be considered that Claimant was so fixated on the use of vinegar with vigorous scrubbing that he was harming himself. Dr. Kleinman opined that Claimant should accept and comply with appropriate medical treatment, use appropriate precautions to prevent an allergic reaction, and return to work. *See* Exhibit B.

49. On July 27, 2015 Claimant underwent an independent medical examination (IME) performed by Alexander Jacobs, M.D. Dr. Jacobs noted Claimant's belief that scrubbing his skin and throat with vinegar was the only way to get relief and that Claimant had refused other medications to control his symptoms including antihistamines, leukotriene modifiers, and moisturizers. Dr. Jacobs provided an impression of: history of asthma, contact dermatitis, right inguinal hernia, history of aphthous stomatitis, somatoform disorder, degenerative joint disease of the hands affecting the PEP and DIP joints, tongue coating probably due to candida, and significant wear of teeth due to frequent acetic acid exposure. Dr. Jacobs noted that although Claimant experienced a positive skin patch test to the liquid dish soap solution, the solution used was full strength and not diluted which would cause a skin burn on anyone. Dr. Jacobs also noted that at work, Claimant's exposure was to washed and rinsed dishes or food that merely touched dishes cleaned by the dishwasher and that Claimant was never exposed to the undiluted dishwasher detergent soap. *See* Exhibit A.

50. Dr. Jacobs opined that with contact dermatitis once contact is avoided, lesions heal. He opined that lesions do not spread nor do they affect a wide distribution of organs as described by Claimant. Dr. Jacobs opined that putting acetic acid (vinegar) in the eyes is far more hazardous than being sprayed in the eyes with a diluted form of dishwashing detergent soap. Dr. Jacobs opined that even if Claimant had some sort of reaction related to the soap used at work, the reaction had long since resolved and opined that the continued symptom prolongation was a consequence of Claimant's home remedy and use of acetic acid (vinegar). *See* Exhibit A.

51. Dr. Jacobs opined that Claimant had somatic symptom disorder and that Claimant truly believed that a reaction to the dishwashing detergent soap was causing all of his problems and would continue to cause problems indefinitely. Dr. Jacobs

expressed his doubt that any logical or objective data would dissuade Claimant. Dr. Jacobs also opined that Claimant aggravated the condition by using vinegar and that Claimant never used the prescribed anti-allergic, anti-inflammatory, or steroidal preparations, and that Claimant believed he was not allergic to any chemicals other than the dish soap. Dr. Jacobs opined that the mental condition Claimant suffers from was not a consequence of work. *See* Exhibit A.

52. Dr. Jacobs testified at hearing consistent with his IME report. Dr. Jacobs opined that Claimant did not suffer a work related injury or occupational disease. Dr. Jacobs opined that Claimant had a number of diagnoses but that none of them were work related. Dr. Jacobs noted Claimant had eczema, keratoses, and contact dermatitis. However, Dr. Jacobs opined that there was no objective basis to opine that the symptoms Claimant developed in late 2014 and into 2015 were work related or caused by the dish soap. Dr. Jacobs noted inconsistencies in Claimant's reports to providers. Dr. Jacobs also opined that vinegar is an acetic acid and if used to excess the vinegar can cause skin irritations, burns, and yeast infections in the mouth. Dr. Jacobs opined that Claimant's use of undiluted vinegar in this case was causing injury.

53. Dr. Jacobs opined that there was no way to determine whether a work exposure or the excessive scrubbing with vinegar had caused Claimant's symptoms as Claimant did not seek medical attention until after he had been using vinegar as a home remedy. Dr. Jacobs opined that there was no way to untangle the potential exposure to diluted dish soap and the exposure to undiluted vinegar scrubbing.

54. Dr. Jacobs opined that Claimant's last exposure at work was in January of 2015 but that Claimant was still reporting trouble in July of 2015 despite removal from the work exposure. Dr. Jacobs opined that with contact dermatitis, after removal from exposure and at most a couple of weeks, the contact dermatitis goes away. Dr. Jacobs opined that if the work exposure or dish soap was causing the symptoms, after cessation of exposure the dermatitis would have gone away and that it was inconceivable that Claimant would still have the ongoing symptoms he has reported in this case.

55. Dr. Jacobs noted that Claimant was allergic to carmine and fragrance II which is found in a large number of products. Dr. Jacobs opined that Claimant has more exposure to these allergens outside of work given the large number of products that contain these two allergens. Dr. Jacobs noted he consulted with a specialist in contact dermatitis who concurred it was unlikely that Claimant's symptoms were due to the dish soap.

56. Dr. Jacobs opined that the patch test for the dish soap was not a valid test because the soap used was undiluted. Dr. Jacobs opined that although it was possible Claimant's initial symptoms were caused by the dish soap, it was not probable. He opined that Claimant's self-treatment with vinegar exacerbated or caused Claimant's symptoms in December and January. He opined that even if Claimant had an allergy to the dish soap, the allergy was internal to Claimant and was not caused by work. He

opined that all of Claimant's symptoms could have been due to the vinegar self treatment.

57. On July 30, 2015 Claimant was evaluated by Dr. McIntyre. Dr. McIntyre opined that Claimant was at maximum medical improvement (MMI) and that he had no permanent impairment. Dr. McIntyre opined that no maintenance was required, and released Claimant to regular full duty work noting his allergy to #37 fragrance mix, carmine, and keystone liquid dish detergent. *See* Exhibit C.

58. The opinions of Dr. Kleinman are found credible and persuasive. Dr. Kleinman's opinion that there was almost a delusional quality to Claimant's somatic complaints is supported by the voluminous medical records including: Claimant's concern that the patch test to the dishwashing detergent soap was digging through his skin and going almost to his spine; Claimant's concern that if he needed surgery for his hernia he would develop a staph infection; Claimant's report that the only way he got relief was to scrub his skin vigorously and pour vinegar on it until he felt burning; Claimant's repeated reports of 10/10 pain; Claimant's repeated reports that his throat was closing up; and the opinion of Dr. McIntyre that Claimant's reported symptoms were out of proportion.

59. The ALJ defers to the opinion of the Dr. Kleinman as a psychiatric examiner that Claimant's psychiatric diagnosis and problems are not work related.

60. The opinions of Dr. Jacobs are also found credible and persuasive and are supported by the opinions of Dr. McIntyre that Claimant's symptoms were out of proportion to his exposure. Dr. Jacobs is credible that Claimant's self-treatment/self-harm with acetic acid made it difficult to determine whether the symptoms were due to Claimant's self-treatment or were due to his occupational exposure.

61. Claimant is not found credible or persuasive. Claimant was inconsistent in many of his reports to medical providers. Claimant initially reported having the symptoms for two years prior to January of 2015. He later reported symptoms beginning in October of 2014 on his hands and in January of 2015 in his mouth. Claimant also reported inconsistently to many providers as to whether his symptoms were improved, the locations of his symptoms, and failed to explain the presence of symptoms on his right buttock or the improvement of symptoms with albuteral asthma treatment. Claimant's testimony, overall, is not consistent with medical reports and is not reasonable.

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 right to compensation under the Workers' Compensation Act exists where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted. *See* § 8-41-301(1)(c), C.R.S. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.*

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" means disease which results directly from the employment of 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 be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would been equally exposed outside of the employment. C.R.S. § 8-40-201(14). This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999). The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). In deciding whether the 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." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet his burden by a preponderance of the evidence to show that he suffered from an industrial injury on January 1, 2015 when he ate a piece of ham at work. The only evidence to support that eating ham caused an immediate burning sensation in his mouth, throat, and caused blisters is the testimony of Claimant. The Claimant's testimony is not found credible and persuasive. Further, Claimant admits that he immediately scrubbed his mouth with undiluted acetic acid and continued to vigorously scrub his mouth and throat with the undiluted acetic acid for several days prior to seeking medical attention. Claimant's actions caused injury to his mouth and throat and were unreasonable. The opinions of Dr. Jacobs is found credible and persuasive that given Claimant's admitted self treatment with vigorous scrubbing of his mouth and throat with acetic acid prior to medical treatment, there is no way to determine if he suffered an injury due to eating ham or to his own scrubbing with acetic acid. Further, the opinion of Dr. Jacobs that eating ham off of a clean tray that had been washed through the dishwashing machine cycle with dishwasher detergent soap, dishwasher sanitizer, and water and that any remaining residue would be unlikely to cause such a severe reaction as reported by Claimant is credible. Claimant had been working and eating food off plates and trays washed in this same dishwashing machine for several years prior with no problems. Claimant has failed to meet his burden to show he suffered an industrial injury on January 1, 2015 by eating a piece of ham off of

a clean tray. It is just as likely that Claimant's symptoms in his mouth and throat were due to his excessive self treatment/self harm by scrubbing vigorously with acetic acid.

Claimant has also failed to meet his burden by a preponderance of the evidence to show that he suffered from an industrial injury on October 1, 2014 to his bilateral hands or that he suffered from an occupational disease to his bilateral hands due to work exposure. Here, there is no way to discern whether any exposure to the dishwasher detergent soap caused injury to Claimant due to his immediate and excessive self treatment with acetic acid. Claimant admitted to scrubbing his hands with an old soft bristle scrub brush that was in Employer's kitchen. After scrubbing his hands, he poured undiluted acetic acid onto his hands until they burned. Claimant did this for several months after he first believed he had burns from the dishwasher detergent soap before he sought medical treatment. Had Claimant sought treatment after he first believed he suffered an injury due to the dishwasher detergent soap rather than self-treat/self-harm for several months, it might be easier to determine whether or not the dishwasher detergent soap itself caused any injury. As found above, this did not occur. When Claimant was first evaluated he had a strong belief that the dishwasher detergent soap had caused his skin lesions, dermatitis, and other symptoms. However, his belief is not reasonable. Dr. Jacobs is credible and persuasive that all of Claimant's reported symptoms just as likely were due to his excessive use of acetic acid. Claimant also was shown by allergy testing to be allergic to fragrance mix II and carmine. Claimant refused to believe the allergic testing was accurate and remained convinced that his only allergy was due to the dishwasher detergent soap and he became fixated on the soap as his only problem despite medical evidence and testing to the contrary. As found above, Claimant uses many products daily that contain fragrance mix II and/or carmine. It is just as likely that Claimant's dermatitis was caused by exposure outside of work and he has failed to establish that the dishwasher detergent soap was the proximate cause of his symptoms.

Further, Claimant displayed symptoms of dermatitis not only on his bilateral hands, but on his right buttock which would be unexplained by his work exposure. Claimant also did not show improvement in symptoms despite removal from the work exposure which according to Dr. Jacobs would be inconceivable as contact dermatitis usually resolves within a couple of weeks after removal from the exposure. Dr. McIntyre similarly was puzzled by Claimant's continued symptoms after removal from exposure and repeatedly opined that Claimant's symptoms were exaggerated and unexplained. Dr. Jacobs' opinion that Claimant did not suffer a work related injury or occupational disease is credible and persuasive. Although Claimant has the diagnoses of eczema, keratoses, and contact dermatitis, there is no objective basis to opine that these diagnoses or Claimant's symptoms are due to the dishwasher detergent soap. Dr. Jacobs' opinion that using acetic acid excessively can cause irritations, burns, yeast infections, and that Claimant's use of it caused injury in this case is also found persuasive.

In this case, Claimant repeatedly attempted to convince medical providers that his problems and symptoms were caused by the dishwasher detergent soap. Claimant

wanted NP Blair to definitively say that his skin reactions, chronic throat pain, and chronic hand pain and arm pain were due to a reaction to the dishwasher detergent soap but she was unable to do so. Several providers were unable to connect Claimant's ongoing complaints to his dishwasher detergent soap exposure. Claimant refused to believe the allergy clinic's test showing he was allergic to carmine and fragrance II. Dr. McIntyre noted repeatedly that Claimant's symptoms were out or proportion to his reported exposure. Dr. Dixon, Dr. Mawn, and Dr. McIntyre were all unsure of the cause of Claimant's problems, but all noted that Claimant seemed convinced that his problems were work related. Dr. Mawn later opined that Claimant's condition was work related but only based on the skin patch test that was performed with undiluted dishwasher detergent soap and that was invalid. His later opinion, based on an invalid test, is not persuasive. The diagnosis of Dr. Kleinman of a non work related somatic disorder and the opinion that Claimant's psychiatric diagnosis was not work related is credible and persuasive. Dr. Kleinman's opinion that there was almost a delusion quality to Claimant's somatic complaints is found persuasive.

Claimant has not established more likely than not that he suffered from an industrial injury or occupational disease. Although it might be possible that exposure to the diluted dishwasher detergent soap after it had run through the machine and run through a rinse cycle could cause dermatitis, it is not likely. Claimant has failed to show that it is more likely than not that this solution was the cause of his symptoms or injury. As found above, the patch test using the solution was not valid. The patch test was performed with undiluted dishwasher detergent soap which would cause burns and reaction on anyone. Claimant also never came into contact with undiluted dishwasher detergent soap as it was directly hooked up to the machine by tube, and the machine automatically injected an amount while the machine was running. After the soap was injection, the machine continued its cycle, including a rinse cycle and Claimant was only exposed to dripping water and clean dishes and was never exposed to the undiluted dishwasher detergent soap during the course of his employment. Claimant has failed to show that his exposure, more likely than not, caused him any injury. Rather, it is persuasive that that his somatic disorder caused him to fixate on the soap and the use of vinegar and caused him to self-treat/self-harm. This somatic disorder is not work related. Further, as argued by Respondents, as a condition of recovery under the workers' compensation system, an injury has to not only be proximately caused by injury or occupational disease arising out of and in the course of employment, but it also must not be intentionally self inflicted. Here, the persuasive medical opinions establish that Claimant self treated and self inflicted harm due to his unreasonable use of acetic acid.

Medical Benefits

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S.; *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).

As found above, Claimant has failed to establish that he suffered from an industrial injury. Therefore, as there is no causal relationship between any symptoms or injury the Claimant suffers from and his employment, Respondents are not liable for any medical treatment to treat Claimant's conditions.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffers from an occupational disease or injury to his bilateral hands, mouth, throat, and groin/hernia.

2. As Claimant did not suffer an industrial injury, Respondents are not liable for any medical treatment.

3. As there was no compensable injury, determination of Claimant's average weekly wage or entitlement to disfigurement is not necessary.

4. Claimant's claim is denied and dismissed.

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

DATED: September 30, 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 he sustained a compensable occupational disease arising out of and in the course of his employment with employer?

- If claimant has proven he sustained a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the injury and from a physician who was authorized to treat claimant?

- If claimant has proven he sustained a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of January 16, 2015 through April 5, 2015 and from June 10, 2015 and continuing?

- Whether respondent has proven by a preponderance of the evidence that claimant is subject to a penalty for failing to timely report the injury in writing to employer pursuant to Section 8-43-102(1)(a) or (2), C.R.S.

- The parties stipulated prior to the hearing that if the claim is compensable, the parties will agree to a designated treating physician for future medical treatment.

- The parties stipulated prior to the hearing that if the claim is compensable, claimant's average weekly wage ("AWW") is $430.00.

FINDINGS OF FACT

1. Claimant was employed by employer as a checker for store #404. Claimant originally began working for employer in 1971 and has worked as a checker since 1994. Claimant testified at hearing that his job duties include reaching and lifting to take items and scan them for customers. Claimant reaches to the right and pulls groceries across from right to left to scan the items for customers. Claimant will lift on average up to 25-30 pounds and can lift up to a maximum of 50 pounds scanning items.

2. Claimant testified that in August 2014 he was scanning items and felt a pop in his right shoulder, but ignored the incident as it did not cause him significant problems. Claimant testified that in the weeks and months after August 2014, he developed additional pain in his right shoulder he associated with his work for employer.

3. Claimant was initially evaluated by Dr. Martin at Delta Family Physicians on November 13, 2014. Claimant reported to Dr. Martin that he started having difficulty with his right shoulder about 3-4 months ago while at work. Claimant reported to Dr.

Martin that his shoulder problems had progressively worsened to the point that he now had unbearable pain. Claimant reported a prior history of a neck injury resulting in a fusion, but reported he was fine after the surgery until recently. Dr. Martin recommended physical therapy, but claimant reported he would prefer conservative treatment first. Dr. Martin noted if claimant demonstrated slow improvement, they may consider a magnetic resonance image ("MRI") of the shoulder to evaluate for partial rotator cuff tear. Dr. Martin provided claimant with a prescription for Percocet, Mobic and Voltaren gel.

4. Claimant testified at hearing that when he sought treatment with Dr. Martin, he knew his shoulder condition was related to work but did not want to report a work injury to employer.

5. Claimant returned to Dr. Martin on January 15, 2015 and noted that he did not receive any relief with the Mobic. Claimant reported he started switching to his left arm at work, but then began to develop problems with his left arm, so he switched back to his right arm. Dr. Martin provided claimant with a steroid injection into the right shoulder and recommended claimant contact the workers' compensation department. Dr. Martin also took claimant off of work for two weeks and provided an opinion that claimant was off of work due to a work related right shoulder injury from overuse.

6. Claimant took the note taking him off of work to employer on January 15, 2015 and reported his injury to employer. Claimant testified that he reported the injury to Mr. Fender. Claimant testified at hearing that he didn't know why he wouldn't have reported the injury to employer in November 2014.

7. After reporting the injury to his employer, claimant was provided with a choice of two physicians, Dr. Wade or Dr. Marlin on January 17, 2015. Claimant testified at hearing that he placed a check mark next to Dr. Marlin and intended to treat with Dr. Marlin, but was informed by Dr. Marlin's office that they were not accepting workers' compensation patients[1]. Claimant testified that Dr. Marlin and Dr. Martin (with whom he had been treating with prior to January 17, 2015 are in the same office. The ALJ notes that Dr. Marlin and Dr. Martin have the same address and the work release given to claimant dated January 15, 2015 has Dr. Marlin's name listed on it (although it does not have Dr. Martin's name, but coincides with her medical treatment).

8. Claimant testified that after Dr. Marlin's office indicated that they were not accepting workers' compensation patients, he made an appointment with Dr. Wade, the other physician listed on the choice of physicians offered by employer. Claimant was evaluated by Dr. Wade on January 20, 2015. Claimant filled out a hand written form for Dr. Wade that indicated that he injured his arm in October 2014 when he was checking and lifting his arm, after which it started hurting and got worse over the next few weeks.

9. Dr. Wade noted that claimant was complaining of right shoulder pain for the past 3 months. Dr. Wade noted claimant had received an injection from his family

[1] The ALJ notes that Respondents timely objected to this line of questioning regarding what Dr. Marlin's office told claimant as hearsay. The objection was overruled by the ALJ.

doctor which helped a little bit. Dr. Wade recommended an MRI of the shoulder and diagnosed a possible rotator cuff tear. Dr. Wade indicated in his notes that his objective findings were consistent with the history and/or the work related mechanism of injury/illness. Dr. Wade took claimant off of work from January 20, 2015 until further notice and instructed claimant to follow up after he got his MRI.

10. Claimant testified the MRI was being scheduled but the claim was denied. Claimant testified he tried to return to Dr. Wade, but Dr. Wade would not see claimant.

11. Claimant eventually returned to see Dr. Martin on February 27, 2015. Claimant reported to Dr. Martin that his claim was denied and he was applying for short term disability. Dr. Martin noted claimant had performed physical therapy exercises at home, but had not gone through formal physical therapy. Dr. Martin noted claimant reported that the prior shoulder injection had only helped for a couple of days. Dr. Martin referred claimant for physical therapy for his shoulder.

12. Claimant began physical therapy for his shoulder on March 2, 2015. The physical therapy notes indicate claimant received some modest improvement with his pain while undergoing physical therapy in March 2015.

13. Claimant returned to Dr. Martin on March 30, 2015. Dr. Martin noted that claimant was undergoing physical therapy and in general felt he was slowly improving, especially with his range of motion. Dr. Martin released claimant to return to work with restrictions as of April 6, 2015. Dr. Martin noted that if claimant's weakness persisted, they would consider an MRI and if appropriate, refer claimant for an orthopedic evaluation.

14. The physical therapy notes indicate claimant reported that his shoulder was pretty sore on April 6, 2015, after his first day back to work. On April 10, 2015, claimant was reporting his pain was much increased with work. On April 13, 2015, claimant noted his pain was still very intense and 7 out of 10 as he had just gotten off work. Claimant reported to the physical therapist on April 17, 2015 that his right shoulder is worse with work. Claimant continued his physical therapy through April 24, 2015.

15. Claimant returned to Dr. Martin on April 27, 2015. Claimant reported to Dr. Martin that by the end of the day with work, he is in severe pain. Dr. Martin opined that claimant's right shoulder issues were due to his job environment as a checker and the repetitive motion associated with his job. Dr. Martin diagnosed claimant with a frozen shoulder and noted her concern for continuing damage for his shoulder associated with his work.

16. Dr. Wade's notes include a note on April 28, 2015 that indicate Dr. Wade had a discussion with claimant and advised him to follow up with his family doctor for now since his workers' compensation claim had been denied.

17. Claimant returned to Dr. Martin on May 26, 2015 with reports that his work was continuing to worsen the symptoms in his shoulder. Dr. Martin noted claimant was

no longer doing formal physical therapy, but continued his physical therapy exercises at home. Dr. Martin noted claimant was now having hand numbness and was dropping things. Dr. Martin recommended claimant stop working as she believed claimant's work was continuing to harm his shoulder. Dr. Martin referred claimant to an orthopedist, Dr. Huene, for further evaluation.

18. Claimant testified at hearing that he went off of work again as of June 10, 2015 due to continued problems with his shoulder.

19. Claimant underwent an independent medical examination ("IME") with Dr. Burris on June 15, 2015 at the request of respondent. Dr. Burris reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Burris diagnosed claimant with right and left shoulder pain, but opined that they were not related to his work with employer. Dr. Burris noted that shoulder discomfort is an extremely common disorder usually associated with degeneration, anatomical morphology and muscle imbalance. Dr. Burris noted that a formal causation investigation was not performed by Dr. Martin or Dr. Wade and opined that claimant's condition is normally associated with frequent repetitive overhead activities, which were not present in this case. Dr. Burris opined that claimant's conditions were not related to his described work activities.

20. Dr. Burris testified at hearing consistent with his report. Dr. Burris testified claimant's condition involved adhesive capsulitis, impingement syndrome and a frozen shoulder. Dr. Burris noted that when claimant reported his injury during the IME, he did not report a pop and did not report he was lifting any item, only that he felt sharp pain in his shoulder when he lifted his arm. Dr. Burris testified claimant's accident history did not lend itself to a specific event and noted that he did not believe claimant described a mechanism of injury related to work that would cause claimant's symptoms. Dr. Burris noted that claimant had reported his hobbies included fly fishing, and opined it was more likely that claimant would injury his shoulder fly fishing than performing activities at waist level. Dr. Burris testified that while claimant had symptoms with activities he performed at work, it was his opinion that the activities did not cause the injury that led to those symptoms.

21. Claimant retuned to Dr. Martin on June 25, 2015. Dr. Martin noted claimant stopped working as of June 9, 2015. Dr. Martin reiterated her opinion that claimant's condition was related to his work and opined claimant had a repetitive motion injury related to his work as a checker which required constant internal/external rotation of the arm along with reaching for items on the conveyor belt.

22. Consistent with Dr. Martin's report, claimant testified he went off of work again on June 9, 2015.

23. Respondent presented the testimony of Ms. Herrera, the Customer Relations Manager for employer. Ms. Herrera testified claimant did not report his injury to her. Respondent presented the testimony of Ms. Hutson, who likewise testified claimant did not report his injury to her before January 15, 2015.

24. Respondent presented the testimony of Mr. Abila, the Store Manager for employer. Mr. Abila testified claimant reported to him in early January 2015 that he had done something to his shoulder, but did not report that it was work related and did not provide a specific date. Mr. Abila testified he asked claimant how he had hurt his shoulder and claimant informed him that he did not know how he hurt his shoulder. Mr. Abila testified he did not speak to claimant again until after he had filled out paperwork for employer around January 17, 2015.

25. Respondent presented the testimony of Mr. Fender, the Assistant Store Manager for employer. Mr. Fender testified he spoke with claimant on January 15, 2015 regarding his right shoulder and claimant was no able to provide a specific date of injury for his right shoulder. Mr. Fender testified claimant reported he injured his shoulder at work but did not explain how he injured his shoulder at work. Mr. Fender testified claimant had a medical report that indicated his shoulder injury was related to work so he filled out paperwork and a written statement on January 15, 2015.

26. Mr. Fender testified that he inquired from claimant again on January 17, 2015 how he injured his shoulder and claimant indicated he had injured his shoulder lifting a turkey. Claimant testified he didn't report injuring his shoulder lifting a turkey to Mr. Fender, but reported to Mr. Fender that before Thanksgiving, checking the turkeys was giving him a lot of pain in his shoulder.

27. The ALJ credits the opinions expressed by Dr. Martin and Dr. Wade over the contrary opinions expressed by Dr. Burris and find that claimant has demonstrated that it is more likely true than not that he sustained a compensable occupational disease arising out of and in the course of his employment with employer. The ALJ notes that claimant's symptoms improved after he was taken off of work in January and was undergoing physical therapy, only to worsen when claimant returned to work. The ALJ finds that a preponderance of the credible evidence establishes that claimant's condition resulted 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. The ALJ credits the opinions expressed by Dr. Martin in support of this conclusion.

28. The ALJ credits claimant's testimony at hearing and finds that claimant selected Dr. Marlin to treat his injury on January 17, 2015. The ALJ finds the treatment provided by Dr. Martin prior to January 17, 2015 was not authorized treatment and respondents are not liable for said treatment. However, after January 17, 2015, claimant selected Dr. Marlin to provide treatment. Dr. Marlin then did not agree to accept claimant as a patient and claimant selected Dr. Wade to treat him for his work injury. The ALJ finds the treatment provided by Dr. Wade on January 20, 2015 as authorized medical treatment.

29. The ALJ notes that Dr. Wade was the 2nd physician listed as a physician offered to claimant to treat his injury by employer and finds Dr. Wade to be authorized to treat claimant for his injury after Dr. Marlin's office indicated they would not accept additional workers' compensation patients.

30. The ALJ finds from the records and claimant's testimony that after treating with Dr. Wade on January 20, 2015, respondent denied claimant's claim for workers' compensation and denied Dr. Wade's referral for an MRI scan of his shoulder. The ALJ credits claimant's testimony as supported by the records entered into evidence and finds that claimant has demonstrated that it is more probable than not that that Dr. Wade then denied medical treatment to claimant for non-medical reasons based upon respondent refusing to authorize additional treatment.

31. The ALJ finds that the choice of physician then reverted back to claimant to choose a physician to treat claimant for his injuries. The ALJ finds that claimant selected Dr. Martin to treat claimant for his injuries and finds that the medical treatment provided by Dr. Martin on February 27, 2015, March 30, 2015, April 27, 2015, May 26, 2015 and June 25, 2015 was reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury. Respondents are therefore liable for the cost of this treatment pursuant to the Colorado Medical Fee Schedule.

32. The ALJ further finds that respondents are liable for the cost of the physical therapy as a referral from Dr. Martin when she was an authorized provider. Again, the cost of the treatment is subject to the Colorado Medical Fee Schedule.

33. The ALJ credits the testimony of claimant along with the medical records of Dr. Martin and Dr. Wade and determines that claimant has demonstrated that it is more probable than not that claimant is entitled to an award of temporary total disability benefits commencing January 16, 2015 when he was taken off of work by Dr. Martin and continuing until April 5, 2015. The ALJ further finds that claimant has established that it is more probable than not that claimant is entitled to an award of TTD benefits beginning June 10, 2015 when claimant left work for a second time at the recommendation of Dr. Martin after his symptoms worsened when he returned to work for employer.

34. The ALJ finds that respondent had proven that it is more likely than not that claimant failed to timely report his injury. The ALJ credits the reports from Dr. Martin and finds that claimant was aware of the compensable nature of his occupational disease by November 13, 2014, but did not report the injury to employer until January 15, 2015. The ALJ finds that claimant was required to report the injury to employer within 30 days of the November 13, 2014 medical treatment, but waited 63 days to report the injury.

35. The ALJ finds that the occupational disease was reported in writing on January 15, 2015 by virtue of the written report from Dr. Martin that was provided by claimant to employer which ultimately resulted in the written reports being completed by employer on January 15, 2015.

36. The ALJ finds that an appropriate penalty for the late reporting of the shoulder injury is one day's compensation for each day claimant failed to report the injury, or 63 days of temporary disability benefits.

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. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. As found, claimant has proven by a preponderance of the evidence that he suffered an occupational disease arising out of and in the course of his employment as a result of his job duties. As found, the ALJ credits the testimony of claimant along with the opinions expressed in the reports from Dr. Wade and Dr. Martin and finds that claimant has demonstrated that his occupational disease is related to his work duties for employer as a checker. The ALJ credits the opinion of Dr. Martin that claimant's duties involving the internal/external rotation of the arm resulted in the development of his adhesive capsulitis and frozen shoulder.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). However, if the physician refuses to treat claimant for non-medical reasons, the claimant has the right to choose a physician to treat his work related injury.

7. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, the treatment provided by Dr. Martin on November 13, 2014 and January 15, 2015 is not authorized medical treatment. As found, claimant selected Dr. Marlin as his treating physician on January 17, 2015, but was advised by Dr. Marlin's office that they were no longer accepting workers' compensation patients. As found, claimant then properly sought treatment with Dr. Wade.

9. As found, claimant's January 20, 2015 treatment with Dr. Wade is found to be authorized medical treatment reasonably necessary to cure and relieve the claimant from the effects of the work injury. Dr. Wade recommended an MRI scan of the shoulder, but respondents then denied authorization for future medical treatment, including the MRI. As found, Dr. Wade then denied further medical care for non-medical reasons (non-authorization of medical treatment) and claimant is then allowed to seek a physician of his choosing to treat him for his injury. As found, claimant then selected Dr. Martin to treat him for his work related shoulder condition.

10. Pursuant to the stipulation of the parties, respondents may designate a physician authorized to provide treatment for claimant's work injury.

11. As found, claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Martin from February 2015 through June 2015, including the referral for physical therapy, was reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, Dr. Martin was an authorized provider as of the February 27, 2015 medical appointment. All medical treatment shall be paid pursuant to the Colorado Medical Fee Schedule.

12. 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).

13. As found, claimant has demonstrated that he is entitled to an award of TTD benefits for the period of January 16, 2015 through April 5, 2015 and from June 10, 2015 an ongoing. As found, claimant's testimony and the reports from Dr. Martin taking claimant off of work as of January 15, 2015 are credible and persuasive regarding the issue of TTD. As found, after claimant returned to work on April 6, 2015, claimant's condition continued to worsen resulting in Dr. Martin recommending claimant again be taken off of work. As found, claimant's testimony that he stopped working June 10, 2015 due to his continued problems with his shoulder is credible and persuasive.

14. Section 8-43-102(2), C.R.S. states in pertinent part:

> Written notice of the contraction of an occupational disease shall be given to the employer by the affected employee of by someone on behalf of the affected employee within thirty days after the first distinct manifestation thereof…. If the notice required in this section is not given as provided and within the time fixed, the director may reduce the compensation that would otherwise have been payable in such manner and to such extent as the director deems just, reasonable, and proper under the existing circumstances.

15. As found, claimant failed to timely report his injury in writing to employer after he was aware of the compensable nature of his condition. As found, claimant was aware of the compensable nature of his condition as of November 13, 2014 when he sought medical treatment for his shoulder. As found, November 13, 2014 is the first distinct manifestation of claimant's occupational disease.

16. As found, respondent is entitled to offset the award of TTD benefits by 63 days of TTD benefits for claimant's failure to timely report the injury to employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits for the period of January 16, 2015 through April 5, 2015 and from June 10, 2015 and continuing pursuant to an AWW of $430.00.

2. Respondents shall pay for the reasonable medical treatment from authorized treating physicians necessary to cure and relieve claimant from the effects of his injury pursuant to the Colorado Medical Fee Schedule. The treatment provided by Dr. Wade is found to be reasonable, necessary and authorized. The treatment provided by Dr. Martin on February 27, 2015, March 30, 2015, April 27, 2015, May 26, 2015 and June 25, 2015 is found to be reasonable, necessary and authorized. Additionally, the referral by Dr. Martin for physical therapy in March 2015 is found to be reasonable, necessary and authorized.

3. The treatment provided by Dr. Martin on November 13, 2014 and January 15, 2015 is not authorized medical treatment.

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: September 23, 2015

Keith E. Mottram

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she injury she suffered a compensable injury to her right knee and chin on February 15, 2015.

STIPULATIONS

Prior to the presentation of evidence, the parties reached the following stipulations should the injury be determined to be compensable:

a. Claimant's Average Weekly Wage (AWW) of $532.00;

b. Claimant is entitled to temporary total disability benefits at the rate of $354.66 per week commencing February 15, 2015 until terminated by statute;

c. Respondent shall pay for medical benefits for Claimant's treatment from Memorial Hospital on February 15, 2015 – February 16, 2015, Colorado Springs Orthopedic Group, and Colorado Sports and Spine Center to the extent that the treatment is related to Claimant's February 15, 2015 right knee and chin injury;

d. Claimant withdrew the issues of disfigurement and permanent partial disability benefits for hearing.

The ALJ approves the parties' stipulations.

FINDINGS OF FACT

1. Claimant works as a deli clerk for Respondent-Employer. On February 15, 2015, the date of her injury, she was working the "opener" shift, which begins at 4:00 a.m. and ends at 12:30 p.m. As an "opener", Claimant's job duties included setting up the meat counter, slicing and arranging meats and cheese, and waiting on customers.

2. On Sunday, February 15, 2015 at about 9:45–10:00 AM, Claimant was walking quickly across the store, from the deli to the store manager's office. Claimant testified that she was in front of the Starbucks kiosk when she her "shoe caught on the floor, and it threw her forward." She landed on her right knee and chin. Claimant testified that she was not carrying anything in her hands and that her arms went straight out as she fell. When Claimant's chin hit the floor, it split open and began bleeding, leaving a copious amount of blood on the floor. After falling, Claimant was unable to stand on her right leg. She was placed in a chair with the assistance from a co-worker and subsequently taken to the hospital for medical treatment.

3. Claimant testified that she did not have any medical problems, such as seizures or pain in her knees prior to her fall. Likewise, she did not have any dizziness or instability when walking and was able to walk without a limp or pain.

4. During cross examination, Claimant was able to recall answering interrogatories in which she reported that there was a sticky substance on the floor which caused her to fall. However, at hearing she testified that she was unsure if that was the case as she did not recall seeing anything on the ground that could have caused her to fall. She testified that there were no rugs or mats on the floor and that the surface of the floor was typical store linoleum.

5. Loretta Pacheco, a co-worker of Claimant was working the self-checkout area near the Starbucks, approximately 10 feet away from where Claimant fell. She testified that she did not witness Claimant fall but noticed "from the corner of [her] eye" Claimant down on the ground. She was the first person to assist the Claimant and when she reached her, she asked if she was okay. Ms Pacheco testified that Claimant mentioned that her knee "went out and she fell pretty hard." Ms. Pacheco testified that other than stating that her knee gave out, Claimant never made any other statements that she tripped on a sticky substance, that there was something sticky on her shoe, or made any additional statements as to the reason she fell. Ms Pacheco stayed with Claimant until Cory Howk, the acting store manager arrived. Ms Pacheco testified that the floor was checked and no debris, water or other substance were found on the floor.

6. Mr. Howk testified that he was straightening up the seasonal section of the store and looked over to see Claimant on the ground. He then went over to assist her. Mr. Howk testified that Claimant stated that she had fallen down, but did not say how or why she had fallen. Mr. Howk testified that Claimant never stated to him that her shoe caught on the floor causing her to fall. Mr. Howk testified that he got the Claimant a chair to sit in, and brought her a bottle of water. He noted that her chin was bleeding pretty badly, and there was a lot of blood everywhere. Mr. Howk cleaned up the blood on the floor. Once the floor was clean, he took pictures of the floor and the bottom of Claimant's shoe, which he testified was company policy.

7. At approximately 10:00 AM, Erica Solis, the front end manager of the store arrived for work. When she walked into the store to start her shift, she observed Claimant sitting in a chair by Starbucks and Mr. Howk cleaning the floor. Ms. Solis sat with Claimant while Mr. Howk completed an incident report. Ms. Solis asked what had happened, to which Ms. Solis testified Claimant responded by reporting that she fell but "didn't know if her knee gave out on her or what had happened, because she has (sic) no idea how she fell."

8. Claimant, after initially refusing medical attention, requested to go to the hospital. Ms. Solis volunteered to drive her. Ms. Solis testified that once at the hospital, Claimant stated that she <u>thought</u> her knee had given out, because there was nothing on the floor that could have caused her to fall (emphasis added). Ms. Solis also testified that

Claimant never stated that her foot had caught on the floor causing her to fall or that there had been anything sticky on the floor causing her to fall.

9. Claimant testified that her fall occurred as she was walking across the store to give Mr. Howk information to prepare her payroll. She testified, "…Corey always did payroll Sunday morning, and I had one vacation day left and I saw the office door open. So that meant he was in there doing payroll." Regarding this testimony, Mr. Howk testified that his job duties as assistant manager include responsibility for the deli department as well as "scheduling, payroll, planning, [and] merchandising." Mr. Howk testified that the department managers usually do the payroll and schedules and hand them into him to type into his computer. Mr. Howk was questioned under cross-examination, "…if the deli manager wasn't available and Ms. Harrigan was bringing her own schedule or her own information to you would that be helpful to you in preparing her payroll correctly?" and he answered that it would be. On further questioning he stated, "If she has vacation days and things like that, it's usually recommended because there is a lot of employees. So, yes, it would be helpful."

10. Based upon the evidence presented, the ALJ finds that Claimant has proven that her injury occurred "in the course of" her employment. The persuasive evidence establishes that the injury took place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions, specifically her need to walk across the store to discuss her work schedule/vacation time with the assistant manager. This finding is supported by Mr. Howk's testimony that this was not only helpful in his preparation of the work schedule, but it was recommended if the employee had "vacation days and things like that." If Mr. Howk did not have the information that Claimant sought to deliver to him, he could not have prepared the Claimant's payroll correctly. Consequently, the ALJ finds Claimant's activity at the time of her fall connected to her job-related functions. Nonetheless, the question of whether Claimant's injury "arose out of" her employment must be resolved.

11. Based upon the totality of the persuasive evidence presented, the ALJ finds that Claimant suffered an unexplained fall on February 15, 2015. The fall was not the result of an occupational hazard, i.e. the condition of the floor or a risk which was inherently personal or private to Claimant, i.e. an idiopathic condition. Respondent-Employer contends that Claimant's fall is not unexplained and due to an idiopathic condition. As support for this contention Respondents cite that Claimant reported the following different mechanisms of injury at some time throughout this case: (1) that her knee gave out, causing her to fall; (2) that her shoe got caught on the floor, causing her to fall; or (3) her shoe got caught on a sticky substance causing her to fall. The ALJ is not convinced, finding that Claimant's various accounts concerning the cause of her fall, while unhelpful to her overall credibility, reflects human nature to ascribe a cause to an otherwise unexplained event. The ALJ finds Claimant's statements regarding the cause of her fall, as testified to by Ms. Solis, the most reliable and therefore most credible history provided by Claimant. Specifically, the ALJ credits Claimant's statements- that she fell but "didn't know if her knee gave out on her or what had happened, because she has (sic) no idea how she fell" and later in the hospital- that she thought her knee had given out, because

there was nothing on the floor that could have caused her to fall, as persuasive evidence that Claimant had no understanding as to why she fell shortly after the incident. The ALJ rejects the balance of Claimant's later statements regarding the cause of fall as an expected outcome of litigation and the perceived need to assign as cause to her injuries.

12. The ALJ also finds Respondent-Employer's suggestion that Claimant fell due to an "idiopathic condition" unpersuasive. Careful inspection of the medical records submitted in this case along with the testimony presented fails to support that Claimant suffered from any idiopathic or self-originating condition causing her to fall. While the Respondents point to the Claimant's knee "giving out", there is no medical evidence to support that an idiopathic condition is responsible for Claimant's knee "giving out." Moreover, as noted above, the ALJ is unable to find record support that the knee "giving out" is the mechanism of injury in this case. To the contrary, the cause of Claimant's fall is unexplained. Based upon the evidence presented, the ALJ finds Respondent-Employer's assertion that Claimant's knee "gave out" because of an idiopathic condition speculation and conjecture.

13. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her right knee and chin as a consequence of an unexplained fall occurring on February 15, 2015.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following conclusions of law.

General Legal Principals

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

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As found here, Claimant's injury occurred in the scope of her employment. The question is whether Claimant's right knee and chin injuries "arose out of" her employment.

F. In C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the Colorado Supreme Court set forth the following three categories of risks that cause injury to employees in determining whether a fall down a flight of stairs was compensable: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee; and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

G. Under the first category, a slip and fall at work is "typically…only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises." *Id.* at 501, quoting from *In re Margeson*, 162 N.H. 273, 27 A.3d 663, 667 (2011). Based upon the evidence presented, the ALJ finds no record support to conclude that an employment-related risk caused Claimant's fall. To the contrary the overwhelming evidence demonstrates that the floor was clean, dry and otherwise free from defects or other hazardous conditions at the time of Claimant's fall.

H. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean "self-originated." *Id.* at 503. Purely idiopathic personal injuries generally are not

compensable unless an exception applies. *Id.* at 503. One exception is when an idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). However, in order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7*.* Courts have previously held that hard level concrete floors, concrete stairs, and a sidewalk curb are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). Furthermore, there is no requirement that the idiopathic condition is symptomatic prior to the injury in order for the special hazard rule to apply. *Alexander v. Emergency Courier Services, supra*. As found here, the record evidence fails to support a conclusion that Claimant's fall was precipitated by an idiopathic condition. Consequently, an analysis of whether such idiopathic condition precipitated an accident and combined with a hazardous condition of employment to cause injury is unnecessary.

I. The third category includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. "An injury is compensable under the Act if triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*, 32 P.3d at 477. Concerning unexplained falls the Court noted an "unexplained fall necessarily stems from a "neutral risk, one that is "attributable neither to the employment itself nor to the employee him or herself." (318 P. 3d 500) "Under our longstanding 'but-for' test, such an unexplained fall 'arises out of' employment if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she was injured." *City of Brighton* and *Cirsa v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Here, the evidence presented persuades the ALJ that the cause of Claimant's fall is truly unexplained and the injuries triggered by a neutral force. While Claimant reported various causes of her fall, careful review of her statements leads the ALJ to conclude that she had "no idea how she fell." As found, Claimant's inconsistent statements regarding the cause of her fall reflects human nature to attribute a cause to an otherwise unexplained event and renders the credibility of the statements as to a cause weeks after the event unreliable. In keeping with the decision announced in *City of Brighton*, the ALJ concludes that Claimant's fall would not have occurred "but for" the conditions and obligations of Claimant's employment, namely to keep the store manager abreast of her work schedule and vacation time to assure that her payroll was properly calculated. Consequently, the ALJ finds that the evidence presented supports a conclusion that Claimant's injury meets the "arises out of" analysis set forth in *City of Brighton.* Claimant has established the request causal connection between her injuries and her work duties. Thus, her injuries are compensable.

J. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, Claimant has proven by a preponderance of the evidence that she suffered an injury in the course and scope of her employment. Consequently, Respondents are liable for that medical treatment reasonably necessary to cure and relieve Claimant from the effects of her compensable right knee and chin injury.

ORDER

It is therefore ordered that:

1. The Claimant's injury is found to be a compensable injury. Respondent-Employer shall pay TTD benefits in accordance with the parties stipulation outlined above.

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. Per the stipulation of the parties, Respondent shall pay for medical benefits for Claimant's treatment from Memorial Hospital on February 15, 2015 – February 16, 2015, Colorado Springs Orthopedic Group, and Colorado Sports and Spine Center to the extent that the treatment is related to Claimant's February 15, 2015 right knee and chin injury

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

DATED: __September 1, 2015__

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise,

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the back surgery recommended by Dr. Tice was reasonable and necessary to cure and relieve claimant from the effects of the injury?

FINDINGS OF FACT

1. Claimant is a 63-year-old male who has worked for Employer since 1999. Claimant testified at hearing that for the past six years he was worked as an equipment operator and mechanic at a wastewater treatment plant.

2. Claimant testified that in approximately 2003, he had a low back injury he described as a muscle strain that resulted from breaking concrete with a sledgehammer. Claimant testified that he sought medical care for approximately two months following the injury, and that he did not have any permanent impairment or work restrictions resulting from that injury. Claimant testified that over the following 11 years, he had occasional soreness in his back that he attributed to his advancing age and the hard labor that is required by his job. Claimant testified that he had some chiropractic care in the past five years, but that the chiropractic care was not intended to treat his low back. He testified specifically that some of the chiropractic care was intended to treat clavicle and neck problems he had arising out of a 2014 work-related injury with employer.

3. Claimant testified that during his treatment for the 2014 work injury, he had some leg numbness described in medical records by Dr. McLaughlin. Claimant testified that his left leg numbness caused pain at a level of two or three out of ten. Claimant testified that he did not know what caused the numbness, and his treating providers did not know what caused the numbness. Claimant did not recall sustaining a back injury that led to his left leg numbness. Claimant testified that the left leg numbness did not result in any work restrictions or further medical care. Claimant testified that in the months following July 2014 (when he was placed at maximum medical improvement ("MMI") for the neck and clavicle injury), the left leg numbness went away.

4. Claimant's medical records document claimant complaining of low back pain dating back to 1999. Claimant's treatment for his low back condition leading up to

the February 27, 2015 incident include claimant receiving chiropractic treatment in August 2012 for his low back. Claimant had complaints of left leg numbness in May 2014. Dr. McLaughlin noted that he believed the left leg symptoms were related to an edema issue and venous stasis difficulties.

5. Claimant testified that in February 2015, he was performing rather heavy maintenance work involving replacing a large water pump. Claimant testified that replacing the pump required strenuous work, including working on his hands and knees for extended periods of time. Claimant testified that while he was doing that project, he would notice soreness and stiffness in his lower back, but he did not have any leg numbness. Claimant testified that he attributed the soreness to his advancing age and working on his hands and knees for extended periods of time. Claimant testified that there was an incident when a pump shaft fell off a board and smashed his fingers, but did not cause any back symptoms. He testified that he did not report that incident or his back symptoms as work-related injuries because he was able to continue to work, and he attributed his symptoms to the heavy work he did during that time.

6. Claimant testified that he awoke on February 27, 2015, he did not notice anything unusual in his low back, other than some aches and pains that were customary. Claimant testified that he was scheduled to attend a wastewater seminar at Ute Water in Grand Junction as part of his work. Claimant testified he went to Employer's wastewater plant for approximately 10 minutes that morning before departing to go to the seminar. Claimant testified that when he arrived at Ute Water and stepped out of his truck, he felt a "tweak" in his low back. Claimant testified that he did not report the tweak because he was not at his workplace and there was no manager present to report it to. Claimant testified that the tweak did not result in any back symptoms at that time.

7. Claimant testified that over the course of the day, he observed seminars without any symptoms, other than stiffness from sitting. Claimant testified that when the seminars ended, he went to the front of the room to retrieve pamphlets for pipe fittings that were discussed during a seminar, because he thought they would work well for various work activities. Claimant testified that the pamphlets were on the floor and when he bent over to pick up the pamphlets and felt another tweak in his low back. Claimant testified that after this tweak, he began to have back pain and soreness.

8. Claimant testified that as he went to his truck and then returned home, and after he arrived home, his low back symptoms worsened and he began having left leg numbness. Claimant testified that he had radiating pain from his low back to the front of his left hip and left leg numbness. Claimant testified that he tried to sit down, and then lay down to ease his symptoms, but his pain was increasing and not improving.

9. Claimant testified that he sought treatment at Family Health West's emergency room ("ER") the evening of February 27, 2015 because he was having very intense pain and thought he might be experiencing another kidney stone. Claimant testified that the back pain he was having was consistent with his prior kidney stone, but

that his left leg numbness and radiating pain from his low back to the front of his body was not consistent with his recollection of his prior kidney stone symptoms.

10. Claimant testified that he called his supervisor, Mr. Etcheverry, to report he was on his way to the emergency room. Claimant testified that he did not report a work injury to Mr. Etcheverry because he did not know for sure what had caused his symptoms, and thought that he was having a kidney stone. Claimant testified that he called Mr. Etcheverry because he was on call for work that night, and wanted to let Mr. Etcheverry know that he could not take calls that night.

11. Dr. Mensing evaluated Claimant in the ER on February 27, 2015. Dr. Mensing noted that Claimant had acute onset of left-sided flank and low back pain that radiated to the lower left quadrant of his abdomen, his left groin, and down the back of his left thigh. Dr. Mensing noted that Claimant felt a small twinge in his back in the morning when he "go[t] out of his truck at work. Pain hit him full-on about 4:30 PM after he got home from work." Dr. Mensing noted that Claimant had a history of kidney stones. Claimant underwent a CT scan at Family Health West the same evening, which showed a left posterior paracentral disk protrusion at L3-4 effacing the left lateral recess. Dr. Reddy, the radiologist, noted that a magnetic resonance image ("MRI") could further evaluate the pathology.

12. On discharge, Dr. Mensing prescribed pain medication and referred Claimant to Dr. Tice for further evaluation. Claimant had an MRI scan of his low back performed on March 3, 2015. The MRI findings included a large left-sided herniated disk fragment measuring 18 by 10 by 11 millimeters at the L3-L4 level causing L3 nerve root impingement, and severe spinal stenosis at L4-L5 due to a disk bulge.

13. Claimant testified there was some delay in seeing Dr. Tice due to scheduling problems. Claimant testified he wanted to treat with Dr. Tice because Dr. Tice had performed his prior surgery. Claimant testified after being released from the hospital and before seeing Dr. Tice for the first time on March 5, 2015, he had low back pain, left, leg pain, and left leg numbness. Claimant testified that he had difficulty sleeping and had left leg weakness. Claimant testified that the left leg symptoms were at a level of six out of ten compared with the two or three out of ten he had during the summer of 2014.

14. Dr. Tice initially evaluated Claimant on March 5, 2015. Dr. Tice noted that Claimant had some stiffness and tightness in his left leg after some treatment for his sternum some time earlier, but that those symptoms went away and did not continue to bother him. Dr. Tice noted that about two weeks earlier, claimant began having some stiffness in his leg, and that claimant's wife noticed that he would walk stooped forward. Dr. Tice noted that on February 27, 2015, Claimant reached over to pick up some papers while attending an educational course for his employer, and had sharp pain in his left buttock. Dr. Tice noted that Claimant's pain progressed into his groin, and that he went to the emergency room that evening. The doctor noted that providers at Family Health West performed a CT scan "thinking that he probably had a kidney stone but saw a deranged disk."

15. Dr. Tice noted:

> I think this patient has a fairly large disk at the L3-4 level that is causing profound nerve root compression. He has moderate weakness and numbness….His disk is very large and given the amount of preexisting spinal stenosis, I do think there is some urgency in treating this….We did discuss his options of nonoperative care, giving it more time, and trying epidural injections, but these have failed in the past. Given the severity of his symptoms and the large size of the disk, I do think an urgent laminectomy-diskectomy should be accomplished….He does want to proceed with surgery as soon as possible….I do think this is a very urgent situation given the size of the disk and the impending progressive neurological deficit that he is facing.

Dr. Tice noted again on March 8, 2015 that he thought surgery was urgent because of significant pain, numbness, and weakness, and that claimant wanted to proceed "before further neurologic [deterioration]."

16. Claimant underwent a left L3-L4 laminectomy, foraminotomy, medial facetoctomy and discectomy surgery with Dr. Tice on March 9, 2015. Dr. Tice noted that Claimant's MRI scan showed a "very large, almost huge disk herniation" and that Claimant had "profound symptoms." Dr. Tice noted that Claimant's leg pain was improved following the surgery.

17. Claimant testified that he did not formally report the injury until March 11, 2015. Claimant testified that due to the pain he was in and the medications he was on for that pain, he was in "such a stupor" he was not capable of giving notice until after the surgery was completed. However, claimant was able to call his employer on the way to the ER when he believed he had a kidney stone. The ALJ finds that there was no reasonable basis for claimant to fail to report the injury to employer before his treatment with Dr. Tice.

18. Claimant filed a Report of Accident on March 11, 2015. He reported the injury as follows:

> The week of [February] 23rd I was working in the digester basement. I was bent down and on my hands and knees putting in a new C-PEX system []. I would go home sore and my legs hurting but thought it would go away. We were putting in the new shaft when it fell on my fingers and I sat up and jerked. On Friday I went to the class at Ute Water. My back twinged as I got out of my truck. Sat in the class all day, then bent over to pick up some papers and another twinge. By the time I got home I couldn't get off the commode. Went to the ER in Fruita because of intense pain. Called [Mr.] Etcheverry on the way to tell him I couldn't take my call[s].

Claimant testified at hearing that his written report was a fair description of what happened on February 27, 2015.

19. Dr. Tice noted on March 11, 2015, that Claimant was having back and leg pain. Dr. Tice noted that Claimant's back pain was much worse than his leg pain. Dr. Tice noted that Claimant actually had "a good result but a fair amount of spasm that is restricting his recovery." On March 19, 2015, Dr. Tice noted that Claimant's symptoms had improved, and that there was little spasm as compared to the week before. Dr. Tice recommended Claimant stay off work. On April 7, 2015, Dr. Tice noted that Claimant was doing better, but was still having leg numbness and back spasm. Dr. Tice recommended physical therapy. Claimant attended physical therapy at Family Health West.

20. Dr. Tice recommended that claimant stay off of work on May 21, 2015

21. Claimant testified at hearing that following surgery, his left leg numbness slowly went away. Claimant testified that he did not have full strength in his left leg, but that his pain had resolved. Claimant testified that he had ongoing back pain. Claimant testified that prior to surgery, his pain level was at approximately eight out of ten, and at hearing his pain level was approximately two out of ten. Claimant testified that he had not returned to work, and had not yet been returned to full work duty. Claimant testified that he has been receiving short- and long-term disability and paid time off benefits via Employer.

22. Dr. Rauzzino performed a medical records review independent medical examination ("IME") on behalf of respondent, and issued a report dated July 14, 2015. Dr. Rauzzino reviewed Dr. Tice's records, and noted Dr. Tice's opinions that the need for Claimant's back surgery was urgent. Dr. Rauzzino noted that Claimant sustained an acute left L3-L4 disk herniation. Dr. Rauzzino opined that Claimant did not have the disk herniation, or any lumbar spine injury, in 2014 when Claimant had leg numbness. Dr. Rauzzino opined that there was "nothing that would lead me to state, to a degree of medical probability, that the disk herniation occurred prior to his bending over to pick up the piece of paper" on the date of injury. Dr. Rauzzino opined that there was nothing conclusive to state that claimant had contribution to or aggravation of a low back condition prior to the acute disk herniation. Dr. Rauzzino opined that claimant's herniated disk was caused by claimant's degenerative disk disease such that the disk eventually failed. Dr. Rauzzino also opined that Dr. Tice treated Claimant on an emergent basis, and that the surgery performed by Dr. Tice was required. Dr. Rauzzino noted that it was his opinion that claimant experienced a disk herniation during a portion of the day during which he was at work, but that the act of bending over to pick up a piece of paper is not a work related injury.

23. Dr. Rauzzino testified at hearing consistent with his report. He testified that although the disk herniation occurred at work, it was not a work-related injury. He first testified that the type of the surgery performed by Dr. Tice was appropriately done on short notice given the severity of Claimant's symptoms. But Dr. Rauzzino later testified that Claimant could have delayed the surgery for some time in order to obtain authorization.

24. Respondents argue that claimant sustained a herniated disk either when getting out of the car at the meeting or when bending over to pick up the papers following the seminar. Claimant argues that he sustained the herniated disk in his back when he bent over to pick up the papers after the seminar. It is imperative to the ultimate findings in this case to determine when the claimant sustained his injury in this case. The ALJ relies on the opinions of Dr. Rauzzino and finds that claimant has demonstrated that it is more probable than not that he sustained the herniated disk when bending down to pick up the papers on February 27, 2015.

25. The question then becomes whether a herniated disk that occurs spontaneously while claimant is bending down to pick up papers related to work (and not while lifiting) is sufficient to establish that the injury arose out of his employment with employer. Respondents argue that the act of bending down to pick up papers is a ubiquitous activity and therefore is not a compensable injury.

26. The ALJ credits claimant's testimony and finds that the papers claimant was picking up at the time he sustained the herniated disk was paraphernalia related to the speaker, and therefore, related to his work. By finding that claimant sustained the injury while bending down to pick up papers related to his work, the ALJ is setting this case up as a question of law as to whether a herniated disk that occurs while an employee is bending down to pick up papers related to work while in the course of his employment represents a compensable injury arising out of an individual's employment. The ALJ recognizes that this could create de novo review for the appellate courts on this question.

27. The ALJ credits the opinions of Dr. Rauzzino and finds that claimant's herniated disk was caused by his pre-existing degenerative disk disease that herniated when he bent down to pick up the papers on February 27, 2015. The ALJ credits the testimony of Dr. Rauzzino and finds that the herniation was the result of it just being the time in which the disk chose to fail and not a specific activity that caused the disk to become herniated.

28. Respondents effectively argue that claimant's condition was the result of a "personal" condition claimant brought to the work site, that being his degenerative disk disease. The ALJ finds that because the disk chose to herniate at the time claimant was bending down to pick up the papers, and was related to his degenerative disk disease, the injury resulted from a risk that was inherent to claimant personally, and did not arise out of his employment.

29. Because the ALJ is finding that the herniated disk in this case arose out of a risk that was personal to claimant (his pre-existing degenerative disk disease), the ALJ finds claimant must establish that his work activities contributed to the herniation. In this case, the ALJ finds that the mere act of bending down did not combine with or cause the spontaneous herniation of his lumbar spine disk. Therefore, the ALJ finds that claimant's injury did not arise out of and in the course of his employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that 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. ICAO*, 5 P.3d 385 (Colo. App. 2000).

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. In Colorado, only injuries arising out of and in the course of employment are compensable under the Workers' Compensation Act. *See* Section 8-41-301(1), C.R.S.; *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 2120(Colo. 1996). The terms "arising out of" and "in the course of" are not synonymous, and both conditions must be proven in order to establish entitlement to workers' compensation benefits. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988).

5. The definition of "arising out of" is narrower than the definition of "in the course of". *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury only arises out of employment "when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Id.* There is no presumption that an employee injured at his place of employment has sustained an injury arising out of that employment, and if no causal connection can be established, a claim is not compensable. *Finn v. Industrial Commission*, 165 Colo. 106, 109, 437 P.2d 543-544 (1968).

6. In order to satisfy the course of employment requirement, claimant must show that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her job function. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). In this case, claimant was traveling for work at the time his disk herniated, so he has established that his injury occurred in the course of employment.

7. As found, claimant's herniated disk occurred while he was bending down to pick up papers while in the course and scope of his employment. As found, claimant was not lifting at the time the disk herniated. As found, claimant's herniated disk resulted from a personal condition (degenerative disk disease) that resulted in a herniation occurring while claimant was bending down.

8. As found, claimant has failed to prove by a preponderance of the evidence that the herniated disk arose out of and in the course of his employment with employer. Specifically, claimant established that the injury occurred in the course of his employment with employer, but did not arise out of his employment with employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

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

DATED: September 17, 2015

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts

222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $1,231.59?

- The parties stipulated prior to the hearing that claimant's AWW with employer was $342.11, which is an increase from the admitted AWW of $272.38.

FINDINGS OF FACT

1. Claimant was employed by employer as a rental technician. Claimant had worked for employer previously, but had begun his most recent stint working with employer on November 17, 2014. Claimant earned $9.55 while working for employer and testified he typically worked from 8:00 a.m. until 11:00 a.m. and from 2:00 p.m. until 6:00 p.m. approximately 4 days per week. The parties stipulated to claimant's AWW of $342.11 based on his earnings with employer during the 9 5/7 weeks claimant was employed with employer. Claimant argues that this base amount should be increased based on his concurrent self employment and the inclusion of board as a fringe benefit for his employment with employer.

2. While working for employer, claimant received discounted food rates from restaurants that allowed for claimant to receive food from 30-50% off the regular price. Claimant also received $5.00 food specials. Claimant testified at hearing that he calculated that he saved approximately $13.00 per day from the regular price for food and usually ate three (3) days per week at the restaurants.

3. Claimant argues that this $39.00 in discounts claimant received by eating at restaurants should be considered "board" for purposes of calculating his AWW. The ALJ is not persuaded.

4. "Board" is defined in the Oxford Desk Dictionary as "2. Provision of regular meals or payment". Claimant's discount, as provided by employer, is not a provision of regular meals, nor a payment for meals. It is simply a discount offered to employees of which they may use or choose not to use. The ALJ determines that meal discounts offered by employers are not to be considered "board" for the purposes of calculating claimant's AWW.

5. Claimant sustained an admitted injury to his right shoulder on February 21, 2015 while employed with employer. Respondents admitted liability for the right shoulder injury and began paying benefits including medical benefits. Respondents filed a general admission of liability ("GAL") on March 23, 2015 admitting for temporary

total disability ("TTD") benefits commencing March 18, 2015 based on an AWW of $272.38.

6. In addition to his work with employer, claimant ran his own business as a general contractor. Claimant testified he had several contracts he was working on in the winter of 2014 through 2015, including a contract with Pet Kare, Cheezem, and City of Steamboat. Claimant testified his AWW should include the projects he was working on during his time working with employer, including the three projects mentioned above.

7. Claimant argues that his AWW would increase if the ALJ takes into consideration this general contracting work. According to the testimony of claimant, and records entered into evidence at hearing, claimant received payment from the City of Steamboat of $7,046.38 for a project that had expenses of $3,378.38 for a net of $3,668.00. Claimant likewise received payment from Pet Kare of $4,650.00 for a project that had expenses of $1,482.68, for a net of $3,167.32. Claimant received payment from Cheezum of $716.16 for a project that had expenses of $70.17 for a net of $646.00. Claimant testified he bid on a project with SEAD of $3,192.00, but this work had to be postponed because of his work with the City of Steamboat. Claimant testified he ultimately could not complete this project and the project was for labor only.

8. Claimant testified that the SEAD contract was started in September 2014 and would take 2 weeks to complete, but he was unable to complete the work. Claimant testified the Pet Kare project involved materials that were ordered in October and started in early November and completed on approximately February 5, 2015.

9. Claimant argues that his net income from these contracts result in an increase of his total earnings by $10,673.32 during the 9 5/7 weeks he was working for employer. However, including these earnings would include $3,192.00 work of work claimant did not perform because he was working on a different project (claimant testified he was unable to complete the SEAD project due to his work with City of Steamboat).

10. Moreover, claimant's tax returns document that claimant reported $8,508.00 in individual income from his business in 2014. Claimant's calculation of his AWW would effectively indicate that claimant's AWW should be increased by an amount greater than what claimant earned for the entire 2014, and then divided by the 9 5/7 weeks claimant worked with employer.

11. Claimant further testified that his work as a general contractor allows him to stay busy all year round for the most part. Claimant testified that he anticipated his construction business would be slow during the winter, and that is why he accepted a job with employer.

12. It is claimant's burden to prove the basis of his claim for an increase in his AWW. Claimant's testimony regarding wages he earned in his general contracting business is found to be not credible when compared to the amounts claimant claimed as income in his IRS forms.

13. While claimant may certainly claim expenses on his federal tax forms, the ALJ finds that claimant's testimony regarding his earnings during his alleged concurrent employment is simple not credible and does not sustain his burden of proving an increase in his AWW based on these alleged net profits.

14. Moreover, while claimant testified he would continue to have expenses from his business even if he weren't working, by including the full $10,673.32 claimant allegedly earned over this 9 5/7 week period, without taking into consideration claimant's ongoing business expenses, would effectively end with respondents underwriting the cost of claimant continuing his business operations during the period of time claimant was unable to work. The ALJ finds this is not the intended purpose of calculating an AWW pursuant to the Colorado Workers' Compensation Act.

15. The ALJ finds that claimant has failed to establish that it is more likely than not that his AWW should be increased based on his concurrent employment. The ALJ cannot establish based on the evidence presented at hearing what projects were started prior to claimant's employment with employer or what earnings claimant had at what time to establish a concurrent AWW. Claimant testified at hearing that he started some projects in September or October 2014, prior to his beginning his employment with employer. Claimant's testimony regarding the amount of money he earned in his general contracting business during the 9 5/7 weeks that he was working for employer is found to be not credible.

16. Based on the foregoing, claimant's request for an increase in his AWW based on his concurrent employment and the value of board provided by employer is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Wages are defined under Section 8-40-201(19)(b) to include "the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefits not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

4. Section 8-40-201(1)(19)(c) further adds that "No per diem payment shall be considered wages under this subsection (19) unless it is also considered wages for federal income tax purposes.

5. As found, "Board" is defined in the Oxford Desk Dictionary as "2. Provision of regular meals or payment". As found, claimant's discount, as provided by employer, is not a provision of regular meals, nor a payment for meals. As found, claimant's discount is simply a discount offered to employees of which they may use or choose not to use. As found, the meal discounts offered by employers are not to be considered "board" for the purposes of calculating claimant's AWW.

6. Claimant's argument to include the savings he was allowed by employ for the reduced lunch is not a "fringe benefit" as allowed under Section 8-40-201(19)(b). Perhaps more telling, even if employer were providing claimant with a per diem for lunch while working, it would not be included as wages unless it was also considered as wages for federal tax purposes. The ALJ further notes that there is no credible evidence that any per diem was provided to claimant that was considered wages for federal tax purposes. As such, the ALJ rejects claimant's argument to increase his AWW based on the $39.00 he saved by eating three days per week at the restaurants on employer's property.

7. As found, claimant's testimony regarding the money he earned with his general contracting business during the 9 5/7 weeks he was employed with employer prior to his injury is found to be not credible. Claimant's argument to include the

$10,673.32 he allegedly earned from his general contracting business is rejected in light of the federal tax returns that document personal income of $8,508.00 from his general contracting company for the entire 52 weeks of 2014.

8. Claimant's request for an Order increasing in his AWW to $1,231.59 is therefore denied.

ORDER

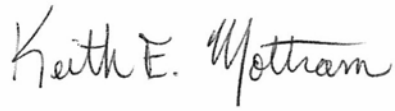
It is therefore ordered that:

1. Respondents shall pay TTD benefits based on an AWW of $342.11 and pursuant to the GAL.

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

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

DATED: September 22, 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
WORKERS' COMPENSATION NO. WC 4-979-306-01

ISSUES

- Whether Claimant suffered a compensable hernia injury on March 11, 2015?
- Whether Claimant is entitled to medical treatment, specifically hernia surgery, as a result of his injury of March 11, 2015?
- Whether Claimant is entitled to TTD benefits?
- And if so, what is his average weekly wage (AWW)?

FINDINGS OF FACT

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

1. Claimant was employed by Employer as an apprentice or "Helper" mason. Employer hired Claimant on February 2, 2015.

2. Claimant alleges he sustained a hernia injury as a result of a March 11, 2015 event when Claimant was in the course and scope of employment for Employer.

3. Claimant testified that on that date he was lifting a five gallon container of wet cement weighing between 120 and 125 lbs. when he twisted to the left and felt an immediate pain in his stomach, testes, and anus.

4. Employer sent Claimant to Dr. Zuehlsdorff at OccMed. Dr. Zuehlsdorff's initial report is consistent with Claimant's statement of his injury. This report provides that from March 11, 2015, Claimant's pain gradually worsened, with abdominal, groin, scrotal, and anal pain. According to the March 12, 2015, evaluation Claimant's pain was 2-3/10. Dr. Zuehlsdorff reported, "He has no history of abdominal pain or surgeries in the past." At Claimant's March 20, 2015 recheck with Dr. Zuehlsdorff, he again reported, "He has no history of any herniations or abdominal pathology." Dr. Zuehlsdorff found Claimant to have a discernible right inguinal hernia.

5. Dr. Zuehlsdorff referred Claimant to Dr. Lampe, a surgeon, who evaluated Claimant on March 31, 2015. Dr. Lampe stated that Claimant suffered a strain at work carrying a heavy load on March 11, 2015, and noted swelling and discomfort in the right groin. He noted Claimant had no prior surgeries. According to Dr. Lampe's report of March 31, 2015, Claimant has a "large right inguinal hernia extending forward to the upper scrotum." On April 2, 2015, Dr. Lampe requested authorization for surgery to repair the hernia.

6. During the course of Respondents' compensability investigation, they discovered Health One and Saint Anthony Hospital medical records from December 2009.

7. On December 3, 2009, Claimant was seen at St. Anthony Hospital, which documented: "Chief complaint: Abdominal pain. Triage assessment: "pt. has herniated area in pelvic region onset August. Noticed small lump does heavy lifting lump has been growing. Does heavy lifting. Is able to reduce." The St. Anthony Hospital record documents: "pt. states hernia is growing," and "Diagnosis: right inguinal hernia, probable direct." Referral to a surgeon was made.

8. Dr. Dunkle at Health One evaluated Claimant on December 3, 2009. His record documents: "The patient notes that in August, he lifted a box of drywall and felt pain in his stomach. He saw a lump. …. He went to the doctor and was advised that he had a hernia." The record states, "he is complaining of a pain severity at a level of 8/10, very strong pain that interferes with the ability to do basic activities." Dr. Dunkle diagnosed Claimant with a "right inguinal hernia."

9. Claimant testified that he suffered right groin pain after lifting a heavy box in August 2009 when he "felt the same kind of pain." He later testified the pain was not the same and that his pain today occurs just with walking and using the restroom. He did not seek care in August 2009 because he "didn't feel it much, and thought it would go away on its own." When he sought treatment in December 2009, he was not given restrictions or time off of work.

10. On December 3, 2009, Dr. Dunkle determined Claimant's injury was not work related because Claimant's symptoms were longstanding since August 2009, and not reported until November 28, 2009. Claimant received no further care or treatment.

11. Claimant continued to work full duty after December 3, 2009 in a variety of construction and other jobs which all required strenuous and heavy lifting.

12. On April 7, 2015, Dr. Raschbacher preformed a records review to evaluate Claimant's request for right hernia repair surgery. He noted receipt of records from St. Anthony Hospital and Dr. Dunkle at HealthOne, dated December 3, 2009. After reviewing those records, Dr. Raschbacher stated: "It appears from review of the medical record that this right inguinal hernia was preexisting, and was symptomatic in the past. It appears his history was not obtained by current treating providers."

13. No persuasive evidence supports a finding that Claimant's hernia, diagnosed in December 2009, was surgically repaired.

14. On April 15, 2015, Dr. Zuehlsdorff noted that he received documentation from St. Anthony Hospital and Dr. Dunkle, at HealthOne, and medical records from Dr. Raschbacher. Dr. Zuehlsdorff reviewed the medical records and changed his initial opinion on relatedness based on that information. In relevant part, Dr. Zuehlsdorff states:

> Given the above, I would opine that the patient has had a previous right hernia. Whether or not he had surgery or not, he never told us anything about the history of the hernia or even a possible surgery. Given the above, I would opine that this was a significant pre-existing hernia and was not caused by the current injury, and therefore, this is not work causal. Given the above information, I would agree with Dr. Raschbacher that the claim should be denied, as this point, with no further care or treatment.

15. On July 6, 2015, Dr. Albert Hattem, M.D., performed a Respondents Independent Medical Examination (IME), of Claimant and issued a report. Dr. Hattem evaluated Claimant, took Claimant's medical history, and reviewed the medical records. Dr. Hattem's report noted the following:

- Claimant reported he developed abdominal pain while lifting a bucket of cement that weighed more than 50 pounds while at work. He experienced immediate pain in his right lower abdomen, right testicle and anus.

- Claimant specifically denies a prior history of hernia or abdominal pain.

16. Dr. Hattem stated that Claimant's right inguinal hernia was not causally related to a lifting incident on March 11, 2015, for the following reasons:

- The presence of a preexisting right inguinal hernia was unquestionable.

- "The right inguinal hernia diagnosed in 2009 is approximately the same size as the one diagnosed in March 2015. It represents the same condition – nothing has changed anatomically since 2009."

- Inguinal hernias do not resolve spontaneously – they require surgical repair. Claimant's condition could not have resolved and then recurred six years later. Claimant's hernia has persisted unchanged since 2009. Claimant required surgery for this condition in 2009 as he does currently. The work incident in March 2015 did not change the need for this surgery.

17. Dr. Hattem, a level II accredited physician, testified for Respondents as an expert in occupational medicine. He testified consistently with his report:

- He agreed with Dr. Zuehlsdorff and Dr. Raschbacher that Claimant's condition is not work related.

- Claimant's 2009 claim was denied so he was not surprised that work restrictions were not assigned at that time.

- Claimant should have had the same work restrictions in place in 2009 that he did in 2015.

- He has dealt with hernias for many years and is not surprised that someone with Claimant's condition could be able to work and earn wages, including performing heavy lifting tasks.

- Claimant's hernia diagnosed in 2009 is in the same place (right side) and is the same size in 2015 as it was in 2009.

- Many methods are used to diagnose a hernia, one of which involves a physical exam. Diagnostic testing such as ultrasound is not necessary and often yields false results.

18. Dr. Hattem's opinions are credible, persuasive, and supported by the weight of the medical records.

19. It is more probably true than not that the lifting event of March of 2015 did not aggravate and/or accelerate Claimant's need for medical treatment. Rather, the surgery needed to fix Claimant's hernia has been needed since 2009.

20. Claimant had only been in the United States for approximately four years prior to 2009, and did not speak English. However, the Saint Anthony medical record dated December 2, 2009 shows that Claimant reported, in the first person, "I think I have a hernia."

21. Claimant's testimony is inconsistent with the great weight of the medical records. Although Claimant apologized at hearing for not reporting his 2009 hernia diagnosis to his medical treatment providers in 2015, the ALJ finds that Claimant was not truthful with those providers during the course of his diagnosis and treatment. The ALJ thus finds Claimant's testimony to be less persuasive than his medical records and less persuasive than the relatedness opinions of his treatment providers and Dr. Hattem.

22. Claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury on March 11, 2015. Thus, the ALJ need not address the remaining issues noticed for hearing.

23. All other issues are reserved.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

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

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading 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).

Substantial Evidence

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions therein. 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).

Causation/Compensability

An injury is compensable under Colorado's Workers' Compensation Act if incurred by an employee in the course and scope of employment. § 8-41-301(1)(b), C.R.S.; *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the injury, such that the injury has its origin of the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *See Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999).

The claimant was 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. Section 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).

The ALJ finds and concludes that Claimant did not prove by a preponderance of the evidence that his hernia injury arose out of or was proximately caused by his

employment. Rather, the greater weight of the evidence, including the medical records from 2009, and the relatedness opinions of Dr. Hattem, Dr. Zuehlsdorff and Dr. Raschbacher, support the conclusion that Claimant's hernia, and his need for surgical repair of same, existed in December 2009.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P .3d 999, 1001 (Colo. App. 2004). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *Id.*, p. 1001. The ALJ finds and concludes that Claimant presented no persuasive evidence that his condition was aggravated, accelerated, or combined with the pre-existing disease or infirmity to produce a disability or need for medical treatment.

ORDER

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

1. Claimant's claim is denied and dismissed.

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

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

DATED: September 28, 2015

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

ISSUES

1. Whether Claimant suffered a compensable injury on April 1, 2015.

2. Whether Claimant was an employee or independent contractor of Employer on April 1, 2015.

3. Whether Claimant department from the scope of his employment by engaging in horseplay on April 1, 2015.

FINDINGS OF FACT

1. Claimant responded to an employment advertisement on Craigslist in early March of 2015. Claimant arrived at Employer's office, was interviewed by an officer manager, and was hired on the spot.

2. The office manager explained to Claimant that the job was a sales job selling Kirby vacuum cleaners. The officer manager explained to Claimant that he would go through training before being sent out to sell vacuums. She briefly explained several documents to Claimant and pointed out to him where to sign on each page. Claimant did not read any of the documents prior to signing them. The following morning, the office manager called Claimant and gave him his training schedule.

3. On March 7, 2015 Claimant signed a "Kirby Independent Dealer Agreement." The agreement provided that Employer was a "distributor" engaged in the business of selling Kirby vacuum systems at wholesale to independent Kirby dealers for resale to consumer end-users through in-home demonstrations. It provided that Claimant was a "dealer" and desired to engage in his own business of buying and reselling Kirby systems to consumer end-users through in-home demonstrations as an independent dealer associated with distributor. *See* Exhibit A.

4. The agreement provided that Claimant understood that he was engaged in an independent business or occupation, that he would not be engaged in personal services for Employer, and that his activities would not be integrated into those of Employer. It provided that Claimant would use his best efforts in his retail sales activities during his association with Employer. Best effort meant spending 50% or more of Claimant's activities in the active retail sales of the Kirby systems whether it be by canvassing, appointment setting, or crew leader activities. *See* Exhibit A.

5. The agreement provided that Claimant would pay Employer the wholesale purchase price of Kirby systems and that at Employer's option, Employer could consign Kirby systems to Claimant for resale to the consumer end-user. If consignment occurred, then the money collected by Claimant would be held in trust for Employer and Claimant's profits/commissions would be measured by the difference between the price paid by the consumer end-user and the wholesale price established by Employer and Claimant for the system. *See* Exhibit A.

6. The agreement provided that Claimant would at all time hold himself out as an independent contractor and would operate as an independent merchant not subject to direction and control by Employer with respect to his selling activities. It provided that Claimant would establish his own place from which to work, times to work, territory to be worked, and was free to engage in other activities including representing competitive product lines. It provided that Claimant was not an agent or employee of Employer. It provided that no taxes would be withheld from Claimant's profits and that Claimant would not be treated as an employee with respect to any services for federal, state, local taxes and workers' compensation purposes which Claimant may elect to obtain on his own as an independent contractor or for unemployment compensation purposes as direct sellers of consumer products. It provided that Claimant understood as an independent contractor that he may incur a loss in his activities and all costs and expenses including providing all tools and equipment associated with Claimant's activities shall be born by Claimant. *See* Exhibit A.

7. The agreement provided that it was for a term of one year and indicated that Claimant's activities were not integrated into those of Employer. It provided that either party could cancel the agreement at any time upon notice to the other party based on any breach of the terms and conditions of the agreement. *See* Exhibit A.

8. The agreement was not notarized, nor were any of the provisions bold or italicized. *See* Exhibit A.

9. Claimant also signed an addendum to the Kirby Independent Dealer Agreement that provided he understood any resale other than to a consumer end-user through an in-home demonstration was a violation and would result in immediate termination of the agreement including sales through e-bay, to wholesalers, or online sales. *See* Exhibit B.

10. Claimant signed a sales contracts/financing form. The form provided that all sales shall clearly identify Claimant by name and phone number, and if the vacuum was consigned by Claimant, then the sale shall provide Employer's name, address, and phone number. The form indicated that Claimant was free to negotiate price discounts based on such things as receiving referrals from a customer, taking a trade-in, receiving credit for a contest, etc but provided that any discounts negotiated by Claimant in making sales of Kirby products to consumer end-users shall not be below the Claimant's consigned cost. It provided that Claimant could arrange his own financing arrangements with the customer and that Claimant was encouraged to seek any

assistance he deemed necessary from Employer prior to, at the time of, or following the sale of the product including, but not limited to, financing options. It provided that Claimant shall provide prospective consumers with business cards identifying himself by name and phone number as an independent contractor furthering his own business purpose. *See* Exhibit C.

11. Claimant signed a consignment agreement electing to consign equipment from Employer. Claimant acknowledged he was financially responsible for the equipment as part of the investment into Claimant's own independent business. Claimant agreed to keep the consigned equipment clean and in good repair and to immediately return the consigned equipment to Employer in the event their relationship ceased. *See* Exhibit D.

12. Claimant signed an agreement as to joint canvassing. The agreement provided that Claimant understood and agreed that participating in a joint sales program involving other dealers on a vehicle was voluntary and not required by Employer and that as an independent dealer he could create his own appointments to maximize the means of achieving retail sales. Claimant's signature acknowledged his agreement that that in the event he wished to engage other dealers to assist him in sales activities ("a helper") he did so independently of Employer and any compensation paid to said helper would be determined by and between Claimant and the helper and not subject to prior approval by Employer. The agreement provided that any such compensation to be paid to a helper shall be disclosed to Employer and paid to the helper in keeping with Employer's normal payment practices, it being further understood by Claimant and the helper that in all instances it is the primary job of the helper/dealer's to be actively engaged in the retail sales of the product and that at all times the helper shall spend fifty percent or more of his time engaged in retail sales activities. It provided that otherwise someone providing only support services for Claimant's retail sales activities may be considered to be an employee of Claimant subjecting him to payment of wages to the helper under state and federal laws. It provided that joint canvassing was Claimant's option in that at all times he could: cold call by himself, advertise, door hang, pre-set appointments, and solicit prospective customers at booths and shows. The agreement stated that if Claimant elected to ride on vehicles with other dealers, he was encouraged to be present at Employer's offices no later than 9:00 a.m. so that the dealers could meet to discuss joint canvassing opportunities. It provided that if Claimant no longer elected to engage in retail sales, he could elect to immediately cease doing so. It also provided that decisions as to what areas the vehicle will be operating will be made by Claimant and other voluntary participant dealers. *See* Exhibit E.

13. Despite what was outlined in all the documents signed by Claimant on March 7, 2014, the actual relationship between Claimant and Employer operated very differently from what was in the signed agreements.

14. When Claimant was hired, he was advised that he would be required to undergo training. Employer contacted Claimant and provided him a training schedule

and told him what times to be present for training. Claimant underwent five total days of training required by and provided by Employer.

15. The first three days were classroom type training sessions that covered a nine step program of what to say and how to present the Kirby vacuums during in-home presentations. The training was outlined by a boot camp packet that each salesperson received. Employer advised Claimant that he had to follow the nine step program during his in-home sales presentations, and that if he did not stick to the sales pitch he would be fired.

16. The next two days of training were in the field where Claimant was required to observe other salespersons.

17. After completing five days of training, Employer advised Claimant that he could begin sales work. Claimant was told to report to Employer's office at 10:00 a.m.

18. Claimant reported at 10:00 a.m. to Employer's office location the following day, and each day thereafter until he suffered an injury. Claimant worked 7 days per week for Employer, averaging 12-14 hours of work per day. Each morning after arriving at Employer's office, Employer went over the training and the required nine point program on how to sell the vacuums to "pump up" the salespersons for the day of selling.

19. Employer advised Claimant that to be on the sales team Claimant needed to be there 7 days per week and had to report to Employer's office in the mornings. Claimant could not set his own schedule. If Claimant wanted a day off, he was required to make a request to Employer two days in advance.

20. Employer provided a company van driven by one of Employer's more senior salespersons, Benjamin Hurd. Employer's owner, Wade Kinnewall, and Mr. Hurd chose the location where the van would go for the day. Claimant had no say in the decision of where the van was heading.

21. Claimant did not set the price of the Kirby vacuums he sold. Rather, after demonstrating to a customer, Claimant called Mr. Hurd to request the price be lowered. Mr. Hurd told Claimant what price Claimant could offer to the customers. Claimant also did not have a say in establishing the wholesale price that he would be required to reimburse Employer for in the event he sold a vacuum.

22. Claimant worked both on his own and with a partner when out for the day. Mr. Hurd made decisions to partner salespersons for the day to hopefully achieve higher sales volumes by having them work in pairs. Claimant had no say in who he would be partnered with during a sales day and the decision was made by Mr. Hurd.

23. Claimant did not set his own financing terms with customers or provide his own financing agreement. If a customer wanted to finance a vacuum, the financing options were provided by Employer.

24. Claimant did not provide any of his own tools and the vacuums and van were provided by Employer.

25. While out for the day in Employer's van, Mr. Hurd was the "team lead" for the salespersons in the van. Mr. Hurd received a portion of the commission from each salespersons sale of a Kirby vacuum. Claimant did not establish the amount that Mr. Hurd would receive if Claimant sold a vacuum. Mr. Hurd drove the van slowly down the sales routes as the salespersons knocked on doors and retrieved the vacuums from the back of the van as needed for demonstrations.

26. Claimant did not establish his own business entity selling vacuums. Claimant did not have a business name, business card, business address, phone listing, liability insurance, and did not sell Kirby vacuums in any manner other than riding along in Employer's van 7 days a week and 12-14 hours per day.

27. Employer paid Claimant personally. Claimant's pay was based on commissions and was not hourly. Claimant's overall pay was based on the sale price of the vacuum, less the wholesale price of the vacuum established by Employer, less the payout to the team lead. Claimant did not set the sales price of the vacuum, did not set the wholesale price he would buy the vacuum for, and did not establish the amount he paid out to his team lead.

28. Employer required that Claimant wear a button-down shirt and maintain a professional appearance.

29. On April 1, 2015 at approximately 5:30 p.m. Claimant was out in the company van performing vacuum sales work. Mr. Hurd was the team lead and was driving Employer's van while Claimant and three other salespersons went door to door attempting to sell Kirby vacuums.

30. Per normal practice, if a customer was interested in viewing a demonstration, the salesperson would go back to the van, take out a Kirby vacuum and return to put on an in-home demonstration.

31. Claimant loaded a Kirby vacuum into the back of Employer's van after performing an in-home demonstration. Claimant then took off running toward two of the salespersons who were walking in the road in front of him. As he was running, Claimant grabbed the hat off of one of the other salespersons head, and attempted to run off with the hat when he lost his balance, fell, and was struck by Employer's van driven by Mr. Hurd.

32. The van ran over Claimant's right leg and ankle and caused Claimant significant injuries for which he has undergone four separate surgeries.

33. At the time of the injury the salespersons were crossing the street on a diagonal to move into the next neighborhood. All the salespersons were in the road heading toward the next neighborhood while Mr. Hurd was driving the van toward the next neighborhood.

34. Horseplay activities were frequent in the course of sales work for Employer. The salespersons in the van on a daily basis were all young men working 7 days per week and 12-14 hours per day. They frequently threw snowballs at one another, joked around, pushed each other into bushes, performed pull-ups on tree branches, and performed push-ups in the middle of the roadway. The team lead also engaged in horseplay. Occasionally, if the team lead thought the horseplay had gotten out of hand or if he believed a customer might be watching, he told the salespersons to "knock it off."

35. Claimant is 23 years old, has no college degree, and is not sophisticated in business dealings. Claimant responded to an employment advertisement, began employment, and followed the instructions of Employer.

36. Mr. Hurd testified as to his belief that he and the other salespersons were independent dealers. He testified that some salespersons sold vacuums part-time through Employer and had other jobs. He testified that some salespersons were not required to sell from the van and went out independently, including one salesperson who took Kirby vacuums on a road trip to another state. He testified that new employees were only encouraged to go out in the van as a good way to learn how to sell. He testified that they were similarly encouraged, but not required, to dress a certain way. He also testified that each salesperson could set the price of the vacuum as they saw fit and that he only provided advice or suggestions to the salespersons in his van.

37. Mr. Hurd's testimony, overall, is not found persuasive. The testimony of Claimant is found more credible and persuasive surrounding the requirement to go out in the van to sell vacuums, the requirement to dress in a certain way, and that the price of the vacuum was set by Employer and the team lead.

38. Claimant's testimony overall is credible and persuasive. Claimant was forthright an open in his explanations of his employment relationship, the requirements of the job explained to him by Employer, and his actions of flipping a hat off of a co-worker.

39. Claimant was not just provided with guidelines on how to operate his independent vacuum selling business. Claimant was trained and advised on exactly how he was to sell Kirby vacuums, was required to ride in Employer's van in order to be

part of the sales team, and was required to work the hours and schedule Employer provided.

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." In this case 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. Since the Claimant performed services for pay for Employer, Respondents in this case bear the burden of proof to prove the existence of an independent contractor relationship. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo.App. 1992); *Frank C. Klein v. Colorado Compensation Insurance Auth.*, 859 P.2d 323 (Colo. App. 1993). 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. 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. Although Claimant signed a "Kirby Independent Dealer Agreement" on March 7, 2015 the document did not contain the required disclosure in larger type or in bold-faced or underlined type. Therefore, the document signed on March 7, 2015 did not create a rebuttable presumption of an independent contractor relationship between the parties and the burden of proof remains with Respondent to establish that the relationship is that of an independent contractor. In this case, Respondent has failed to meet their burden.

Free from control and direction

To be deemed an independent contractor, an individual has to be free from control and direction in the performance of the service both under the contract for performance of service and in fact. The person also must be customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Under § 8-40-202(2)(b)(II), C.R.S., to prove a person 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 the factors is not conclusive evidence that an individual is an employee, nor does the statute require satisfaction of all nine factors to prove that the individual is an independent contractor. *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998). In the present case, after weighing the nine factors and examining the relationship as a whole, Respondents have failed to show that Claimant was free from control and direction in performing services.

Employer required Claimant to work 7 days per week with an average of 12-14 hours per day. Claimant was told when hired that this was the schedule and that if he wished to be part of the sales team, he was required to show up daily to go out in Employer's van. Employer thus dictated the time of performance and Claimant had no choice in his hours or schedule as a salesperson. Employer provided Claimant with substantial training prior to allowing him to begin sales work. Employer established a quality standard for Claimant and instructed Claimant that he had to perform his sales duties using the 9 steps outlined in Claimant's training and in the boot camp booklet. Employer provided a daily refresh of the training and went over the 9 sales steps each morning to "pump up" the salespersons before they went out to sell for the day. Mr. Hurd and Employer's owner decided where the van would go for the day and Claimant had no choice in the sales territory that would be covered each day. Claimant's sales work was monitored by Mr. Hurd the team lead. Claimant was often paired up with another salesperson for the day with no choice in the pairings. Employer provided the van as well as the vacuums used for demonstration. Claimant was also paid personally by Employer after Employer took out the wholesale price of the vacuum, and paid out the team lead.

Claimant signed a number of documents on the date he was hired without reading them. As found above, Claimant is 23 years old, without a college degree, and is unsophisticated in business dealings. Although the documents Claimant signed on March 7, 2015 and the contract of performance purport to establish that Claimant was free from control and direction in the performance of his duties, in fact Claimant was not. After examining the relationship and the 9 factors of § 8-202(2)(b)(II), C.R.S. to determine whether Claimant was in fact free from Employer's control and direction, the

ALJ concludes that Claimant was not. Rather, Claimant simply followed the directions of Employer, showed up to work when told, performed sales work following the mandatory sales script and 9 steps, and followed Employer's instructions as to what location he would sell in, who he would be paired with, what price he could sell the vacuums for, and what to wear. Respondents have therefore failed to show more likely than not that Claimant was free from control and direction in the performance of sales duties and that the relationship was that of an independent contractor.

Customarily engaged in an independent trade, occupation, profession, or business

For Claimant to be deemed an independent contractor, Respondents also must show that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. In this case, a preponderance of the evidence does not show that Claimant was engaged in the independent business of vacuum sales. Claimant did not have his own business entity, business name, business cards, business address, business phone listing, his own tools, any financial investment subject to a risk of loss, or liability insurance. Claimant did not set the price of the vacuums he sold, but was advised by Employer and Employer's team lead as to how much he could mark down the price of a vacuum to close a sale. Claimant did not prepare or submit invoices for Employer. Employer also was reasonably aware that Claimant was not engaged in an independent business based on the working relationship Employer had with Claimant. Employer knew that Claimant reported to their office 7 days a week and worked 12-14 hours per day, thus leaving no time for outside employment or for Claimant to independently sell vacuums on his own. Claimant did not have an independent trade, occupation, profession, or business selling vacuums. Rather, he responded to an employment advertisement and showed up to work doing as he was told by Employer. Claimant took no steps to create his own trade or business and simply followed the instructions of Employer. Although Claimant signed documents purporting to acknowledge he had an independent trade, occupation, profession, or business the true nature of the relationship fails to establish that Claimant was customarily engaged in an independent trade, occupation, profession, or business.

In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not 'engaged' in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court declared "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015. The *Softrock* Court pointed as an example the

decision in *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008). In *Long View* the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015. In the present case, analyzing the nature of the working relationship, the nine factors of § 8-202(2)(b)(II), C.R.S., the *Long View* factors, and the overall relationship, the ALJ concludes that Claimant is not customarily engaged in an independent trade or business and that Respondent reasonably knew Claimant was not engaged in an independent trade or business based on their working relationship with Claimant. Employer expected Claimant not to take on other customers and required Claimant to work full time, 7 days a week, 12-14 hours per day for Employer.

Horseplay Doctrine

To establish that an injury is compensable, Claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.* It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

If the claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). Where, the alleged deviation from employment involves "horseplay," our courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

> (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. Ultimately, resolution of the issue is one of fact for determination by the ALJ. *Panera Bread, LLC v. Industrial Claim Appeals Office, supra.*

Claimant has met his burden to show that he suffered an injury arising out of and in the course of his employment with Employer. Claimant did not substantially deviate from the circumstances and conditions of his employment by engaging in horseplay to make his injury outside the scope of his employment. The deviation was slight and not serious and was commingled with the performance of his job duties. While continuing to walk door to door to sell vacuums, and after having just loaded a demonstration vacuum into Employer's van, Claimant made the mistake of running to knock a hat off of a co-worker. Although this was a deviation from the act of selling vacuums, it was a slight deviation and occurred while moving through the neighborhood in furtherance of knocking on more doors to sell vacuums and was commingled with the job duty of walking the neighborhood. Additionally, as found above, horseplay amongst Employer's salespersons, including Employer's team lead was an accepted part of the employment. The salespersons who spent 7 days per week and 12-14 hours per day walking neighborhoods and riding in a shared van regularly engaged in horseplay including: throwing snowballs at one another, doing pull-ups on tree branches; doing pushups in the middle of roadways; and joking amongst each other. The act of Claimant running to flip a hat off of one of his co-workers was part of the camaraderie and accepted horseplay that had been part of the employment. Further, the nature of the employment with long hours and several young salespersons together 7 days per week was generally expected to include some horseplay. In reviewing the four-part test surrounding the horseplay in this case, Claimant did not substantially deviate from employment to make his injury outside the course and scope of his employment. Claimant has established that the injury arose out of and occurred in the course of his employment and is compensable.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on April 1, 2015.

2. Claimant was an Employee of Employer on April 1, 2015.

3. Claimant's horseplay activity at the time of the injury did not constitute such a substantial deviation from the conditions of his employment to take his injury outside the course and scope of his employment.

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: September 1, 2015

/s/ Michelle E. Jones

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

ISSUES

➢ Whether respondents have proven by a preponderance of the evidence that claimant's injury was caused by a willful violation of a safety rule allowing for a reduction of non-medical benefits by 50% pursuant to Section 8-42-112(1)(b)?

FINDINGS OF FACT

1. The parties stipulated at the hearing that claimant was told by employer not to pile cardboard on the floor. The parties stipulated that Mr. Luzietti, a supervisor for employer, told employees not to pile cardboard on the floor at safety meetings. The parties stipulated that Mr. Luzietti was present in the store at the time of claimant's injury, but not where claimant fell.

2. Claimant sustained an admitted injury while employed with employer on March 28, 2015 when she stepped on cardboard and slipped. Respondents filed a general admission of liability on April 21, 2015 admitting for workers' compensation benefits including medical benefits and temporary total disability ("TTD") benefits.

3. Following claimant's injury, witness statements were obtained by employer. Copies of the witness statements were entered into evidence at hearing. Claimant's Associate Incident report indicates she was injured when she "steped (sic) on boxes to pick up small ones and they sliped (sic) beneath me". The manager, Mr. Luzietti, completed a section below claimant's written statement that read: "cardboard should not have been placed on the floor". The manager also indicated that claimant may need to undergo retraining on the correct way to store cardboard when working.

4. The witness statement from Mr. Luzietti indicated as follows:

> I was told of an accident up at our deli area. When I got to the deli, (claimant) was laying on the ground. She stated that she had slipped on cardboard that was on the ground. She believed she had twisted her knee.

5. The witness statement from Ms. Daugherty indicated as follows:

> (Claimant) and I had been working in Deli unloading and unpacking boxes. As boxes were unloaded and broken down the boxes were laid on floor under spy table. I told (claimant) to pick up boxes and take to compactor. I was in process of moving pallet to backroom. I walked with pallet on jack towards action alley about 35 yards away I heard (claimant) scream. I quickly went to her. I found her lying on floor directly in front of deli with

> boxes scattered around her. (claimant) was lying partially on right hip complaining of right knee pain. Management was called for. (claimant) stated she did not actually fall but only hands touched floor as she caught herself from complete fall. (claimant) declined call to 911 stating a feel of pulled knee muscles. After approximately 2 hours, (claimant) agreed to move to wheelchair. Manager Brandi and I gently moved (Claimant) to wheelchair. I then got (claimant)'s purse from her vehicle. Afterwards I attempted to call (claimant)'s boyfriend to pick her up… No further witnesses to accident.

6. Claimant testified at hearing that on the day of her injury, she was working with her supervisor, Ms. Daugherty. Claimant testified that they were stocking a new store for employer, preparing the store for its grand opening. Claimant testified this involved completely stocking the entire store. Claimant testified that normally employer would provide a pallet to place cardboard boxes on that would then be moved to the back area where a cardboard compactor was located. However, on the day of claimant's injury a pallet was not provided to place the cardboard boxes on. Claimant testified that she was placing her cardboard boxes on the table. Claimant denied placing her boxes on the floor and testified she did not know how that boxes in question got to the floor.

7. Claimant testified that Ms. Daugherty said she was taking the pallet jack to move some product that was not to be stocked in the deli area to the back of the store. Claimant testified she doesn't recall stepping on the boxes, but slipped and injured her knee. Claimant testified she did not fall all the way to the floor, but caught herself.

8. Claimant's testimony that she did not place boxes on the ground is not refuted by any credible evidence in this case. The witness statements do not indicate that claimant placed the cardboard on the ground that caused her fall and are found to be consistent with claimant's testimony at hearing. The ALJ finds claimant's testimony at hearing to be credible.

9. The ALJ finds that respondents have failed to establish that it is more likely than not that claimant placed cardboard on the ground, or that if claimant placed cardboard on the ground, that the cardboard caused her to slip. The ALJ finds that the evidence establishes that it is just as likely that that the cardboard in question was placed on the ground by Ms. Daugherty and therefore, the ALJ cannot find that respondents have established their burden of proving that claimant committed a willful violation of a safety rule that would subject claimant to penalties under the Colorado Workers' Compensation Act pursuant to Section 8-42-112(1)(b), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 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, claimant testified that she placed her cardboard on the table and did not place it on the floor. This leaves the possibility that Ms. Daugherty may have placed her cardboard on the floor, resulting in claimant slipping on the cardboard. As such, respondents have failed to establish that claimant committed a safety rule violation by placing her cardboard on the ground.

6. Because respondents have not established that claimant willfully violated a safety rule, respondents request for a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b), C.R.S. must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents request for an Order allowing for a 50% reduction of non-medical benefits for a violation of a safety rule pursuant to Section 8-42-1112(1)(b), C.R.S. is denied and dismissed.

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: September 21, 2015

Keith E. Mottram
Administrative Law Judge

#JGUGWI0D0D1C6Sv 2

Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-985-670-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 23, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/23/15, Courtroom 3, beginning at 8:30 AM, and ending at 12:00 PM). Rashid Sadiq was the Somali/English Interpreter.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through F were admitted into evidence, without objection. Claimant's objection to Respondents' Exhibit G was sustained and the exhibit was refused.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on September 28, 2015. On September 29, 2015, the Claimant filed objections in the form of suggested edits to the proposed decision. On the same date, the Respondents indicated no objection to the suggested edits, other than to the suggested edits to proposed Findings Nos. 7 and 11. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability and, if compensable, medical benefits.

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. The Claimant drove a cab for the Employer as an independent contractor between 2012 and May 15, 2015.

2. As a condition of his contract with the Employer, the Claimant was required to periodically enter upon the Employer's premises to reconcile his account at the cashier's office.

3. Alfredo Maturo is the Operations Manager for the Employer. His responsibilities include overseeing driver accounts and, as necessary, retrieve leased vehicles from drivers whose accounts are substantially in arrears. Retrieval may be achieved by requesting keys to the cab and, if refused, reporting the vehicle stolen or sending a tow truck to the vehicle's location and towing it back to the Employer's premises.

The Incident

4. On May 15, 2015, the Claimant appeared at the Employer's premises to reconcile his account. While there, he encountered Jamal Bakar, Maturo's assistant operations manager. Bakar told the Claimant that he needed to see Maturo regarding his account.

5. The Claimant spoke with Maturo and Maturo told him that he needed to take the keys and take possession of the cab. The Claimant walked away from Maturo, exiting the building and walking toward East 41st Avenue between 11:00 and 11:30 AM. Maturo believed that the Claimant was walking to the cab which was the subject of his request. In fact, it was not the cab, but THE Claimant's personal vehicle.

6. The Claimant and Maturo had a discussion about return of the cab to the Employer as they walked in the direction of the Claimant's personal vehicle. The

Claimant testified that Maturo became aggressive and poked him in the chest once with his fingers. Maturo testified that he did not touch the Claimant, but merely extended his right hand with palm out and fingers pointed upward in the form of a gesture for the Claimant to stop. The upward palm is inconsistent with the Claimant's version of being poked in the chest by Maturo using the index, middle and ring fingers. Based on the Claimant's credibility deficits as herein below described, the ALJ finds Maturo's denial of touching the Claimant more credible than the Claimant's version. The ALJ, therefore, finds that Maturo did **not** touch the Claimant at the time in question.

7. At approximately the same time as the Claimant and Maturo walked to East 41st Avenue, another driver, Yusuf Ige, was exiting the premises. Ige represented himself as a committee leader, a form of driver representative equivalent to a union shop steward. On May 15 Ige arrived at the Employer's premises to reconcile his account before returning to the hospital to visit his wife and newborn child. He concluded his business and departed the premises. During the course of his departure, Ige observed the Claimant and Maturo facing each other and Maturo making a gesture of an outthrust right hand with palm directed at Claimant and fingers pointed upward. Ige did not stop to engage the Claimant or Maturo, continuing on his way.

8. The Claimant stated that he contacted the Denver Police Department on the afternoon of May 15th and reported being struck. He testified that he felt pain and sought medical attention at Rocky Mountain Occupational Services, implying or leaving the impression that such medical attention was in close proximity to his encounter with Maturo. In fact the Claimant first sought medical attention almost two months after the incident. The ALJ finds that this discrepancy compromises the Claimant's credibility. The Claimant stated that he experienced chest pain after the encounter and that he has not worked since May 15, 2015. Finally, he stated that he reported his injury to the Employer shortly after the event. The Workers' Claim for Compensation (Claimant's Exhibit 1) is dated June 11, 2015, almost one month after the incident, yet it recites a reporting on May 15, 2015. The ALJ, however, finds that the Employer was aware of the Claimant's claimed "assault" as of May 15, 2015, by virtue of the report to the Denver Police Department. The ALJ infers and finds that the Claimant felt that he was being deprived of his livelihood by Maturo and somehow felt that reporting a work-related injury would help him financially. As found, herein below, the Claimant had previous experience with a partially settled workers' compensation claim.

9. Maturo testified that after the Claimant left the premises, he returned to his office and proceeded to effectuate a recovery of the cab within the hour. Several hours later, he was visited by Denver Police Department officers and cited for striking the Claimant. The charge was ultimately dismissed on motion of the prosecution.

10. During cross examination, the Claimant was asked about interrogatory responses he had given concerning whether he had sustained any work related or non-work related injuries. The Claimant answered that question in the negative, denying

that he had sustained any injuries other than from the May 15, 2015 confrontation with Maturo. As found herein below, this answer was not truthful.

11. The ALJ took administrative notice of W.C. No. 4-906-836, a worker's compensation claim maintained by the Claimant on account of a December 19, 2012 accident with the same Employer and in which he injured his neck and low back. A November 26, 2013 Final Admission of Liability (FAL) and a July 25, 2013 Partial Stipulation and Motion for Approval bearing the Claimant's notarized signature was offered and accepted into the record. The record also contained a claim for compensation by Claimant dated June 11, 2015 and an accident report from the Employer which noted the report of injury as June 24, 2015 (Respondents' Exhibit F). The ALJ finds that the inconsistency between the Claimant's hearing testimony, under oath, and his answer to the above interrogatory, under oath, significantly compromises the Claimant's credibility.

12. The Claimant was first seen at Rocky Mountain Occupational Services on July 7, 2015 (almost two months after the incident in question). A physician diagnosed him with costochondritis. The initial report of that date states that the findings were consistent with the history and/or work related mechanism of injury, but no history of injury is contained within the report. Indeed, the "physician's signature is undecipherable and there is no explanation concerning the diagnosis. The ALJ is reminded of the anecdote where an individual who had allegedly suffered a traumatic event, which should have caused immediate consequences, fell down two weeks later, asked his lawyer how he did on the witness stand. His lawyer replied: "let me put it to you this way. If a punch Muhhamad Ali and he falls down two weeks later, I don't get to be heavy weight champion of the world." Based on the Claimant's delay in seeking medical treatment and the undecipherable and inadequate medical report, the ALJ infer and finds that the Claimant has failed to meet his burden of proving a work-related "costochronditis," caused by the circumstances of May 15, 2015.

Ultimate Findings

13. The ALJ finds the Claimant's testimony lacking in credibility for the reasons stated herein above. The ALJ finds Maturo's testimony that he did **not** touch the Claimant at the time in question credible and supported by the totality of the evidence.

14. Between the conflicting testimony of the Claimant and mature, the ALJ makes a rational choice to accept Maturo's version of the incident in question and to reject the Claimant's version.

15. The Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable injury on May 15, 2015, as he alleges.

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 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). As found, the Claimant's testimony was lacking in credibility for the reasons stated herein above. Maturo's testimony that he did **not** touch the Claimant at the time in question was credible, supported by the totality of the evidence, and dispositive of the compensability issue.

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 the conflicting testimony of the Claimant and Maturo, the ALJ made a rational choice to accept Maturo's version of the incident in question and to reject the Claimant's version, which is dispositive of the compensability issue.

Burden of Proof

c. 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 failed to prove that he sustained a compensable injury on May 15, 2015, as he alleges.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

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

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

_____
Court Clerk

Wc.ord

ISSUES

The issue addressed in this decision concerns Claimant's entitlement to medical benefits, specifically an arthroplasty of the right hip. Because Respondents' medical expert agreed that the arthroplasty was reasonable and necessary the only question to be resolved is whether the need for the total hip replacement procedure was causally related to Claimant's admitted August 6, 2010 industrial injury

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on August 6, 2010 while working for Womack's Casino. She slipped on a wet floor and fell to the ground. She fell on her right side, but also injured her left knee. The left knee has been the primary focus of treatment throughout the course of her claim. She had two surgeries on the left knee, including a patellofemoral replacement in March 2014.

2. In addition to her left knee problems, Claimant has experienced slowly progressive right hip pain since the accident. As noted previously, she fell directly on her right side, including her right hip, in the initial accident. Claimant was referred to Dr. James, whose initial report documents "[t]he fall also caused pain in … [her] hip."

3. The right hip pain eventually diminished and became minor. The hip pain was far overshadowed by the significant and protracted problems she was having with her left knee (including multiple surgeries).

4. Claimant was referred to Dr. Messner for authorized treatment in December 2010. Dr. Messner has performed both surgeries on Claimant' left knee, and has been managing her treatment for several years.

5. On April 13, 2012, Claimant reported to Dr. Messner that she had "been having some intermittent pain in her right groin area for a while now." Dr. Messner explained in his deposition that groin pain is actually a classic sign of hip pathology. Dr. Messner obtained an x-ray of the right hip, which was interpreted as showing mild

arthritis. (Ex. 1/70). Dr. Messner explained in his deposition that the quality of the x-rays was limited, but at the time he did not see any significant issue other than the arthritis.

6. On February 25, 2013, Claimant' was evaluated by Dr. James' PA-C, Denver Hagar, for her right hip pain. The record notes "[s]he states that this is pain that occurred during the original workmen's comp injury." Claimant also reported "she had [sic] her hip during the original fall and it has hurt intermittently. She states that 2 months ago it started hurting more." She also reported that she had recently strained her hip while getting in her truck. PA-C Hagar did not believe the hip pain was related to the original injury and did not refer her for any additional evaluation.

7. Claimant underwent patellofemoral replacement surgery on the left knee on March 10, 2014.

8. In July 2014, Claimant again asked Dr. Messner to evaluate her right hip. She indicated that "for the last two months her hip pain has been increasing. The pain starts in the joint area and travels through her groin. She uses a walker at home when the pain is too great for the hip to hold her." Dr. Messner obtained x-rays of the right hip, which showed osteonecrosis of the femoral head. Dr. Messner referred Claimant for an MRI of the right hip.

9. The MRI confirmed osteonecrosis of the femoral head and showed a nondisplaced fracture of the femoral head. After reviewing the MRI, Dr. Messner discussed the history of the hip problems with Claimant in detail. Dr. Messner noted "[s]he does not recall a recent injury. She only remembers the fall on her hip when she injured her knee several years ago. . . . Her range of motion has been decreasing over the last year. She now has very little range of motion."

10. Claimant had a right total hip arthroplasty on August 25, 2014.

11. Dr. Messner testified in deposition regarding his opinion that the right hip osteonecrosis is medically probably related to Claimant' August 6, 2010 fall at work.

12. Dr. Larson performed a RIME at the request of the Respondents. Dr. Larson agreed that the right hip arthroplasty was reasonable and necessary treatment for the osteonecrosis in Claimant's right hip. But, Dr. Larson opined that the osteonecrosis is not causally related to Claimant's industrial injury. Dr. Larson did not offer any alternate causal explanation for the development of osteonecrosis. Rather, Dr. Larson opined that the cause is unknown.

13. The ALJ finds Claimant to be credible.

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

15. The ALJ finds Caimant has proven by a preponderance of the evidence that she developed osteonecrosis as a direct and proximate consequence of her August 6, 2010 work injury.

CONCLUSIONS OF LAW

1. The Respondents are liable for authorized medical treatment that is reasonable, necessary and causally related to an industrial injury. C.R.S. § 8-42-101(1)(a). Specifically, C.R.S. § 8-42-101(1)(a) provides, "[e]very employer . . . shall furnish such medical [treatment] . . . as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." Whether a particular condition or treatment modality is causally related to the accident is a question of fact for the ALJ. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1999).

2. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. In deciding whether a claimant has met her burden of proof, the ALJ is empowered, "[t]o 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).

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

5. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

6. The preponderance of persuasive evidence demonstrates that Claimant has met her burden in establishing that her right hip osteonecrosis, necessitating her need for right hip arthroplasty, is related to her industrial injury. While 20-50% of the cases of osteonecrosis develop without a known cause, i.e., they are "idiopathic", Dr. Messner persuasively articulated the factors which establish a causal connection between Claimant's osteonecrosis and her August 6, 2010 fall. Here, Claimant fell and landed on her right hip. As a consequence, her right hip directly impacted the floor. Claimant reported pain in the right hip at her first ATP evaluation after the accident; however, her hip pain was likely overshadowed by severe problems with the left knee, which became the primary focus of her treatment, as evidenced by her multiple left knee surgeries. Consequently, the Claimant did not mention or seek treatment for her hip pain until it worsened considerably approximately 20 months later. When Claimant requested that Dr. Messner evaluate her hip pain in April 2012, she reported that the pain had been present "for a while now." When she again sought treatment for the progressive hip pain in February 2013, she explained that "this is pain that occurred during her original workmen's comp injury." She further reported that "she had [sic] her hip during the original fall and it has hurt intermittently."

7. Dr. Messner took an x-ray of the right hip in April 2012. At that time, he did not perceive any fracture, but simply saw some "mild" arthritis. Subsequently, a MRI obtained in July 2014 revealed an "old" non-displaced fracture of the femoral head, and advanced bone destruction caused by osteonecrosis. Looking back on the 2012 x-ray with the benefit of hindsight, Dr. Messner realized that he had missed indicators that the fracture was present at that time. Dr. Messner likely missed it, he testified, because x-rays are less sensitive for subtle bone changes than MRIs and because of under-penetration during the 2012 x-ray resulting in a low quality image.

8. As Dr. Messner testified, the type of fall and impact that Claimant suffered is sufficient to cause a non-displaced femoral head fracture and the subsequent development of osteonecrosis secondary to disrupted blood supply to the femoral head. According to Dr. Messner about 90% of all femoral head fractures are caused by a direct fall to the ground without extra height added to it. Moreover, Dr. Messner

explained that when he was able to compare the 2014 MRI with the 2012 x-ray, he was able to discern an area of signal consistent with bone healing (i.e., increased mineralization) ***in the exact same area*** where the fracture and osteonecrosis appeared on the MRI in 2014. Specifically, Dr. Messner testified:

> A. [I]n 2012 when I'm looking at the X-ray in retrospect, I can see darkness in that area, which would mean . . . there is more mineral in that area. It could be that it's trying to heal but I just never picked up the fact that there was anything more going on there.
>
> Q. When you say "that area" –
>
> A. The area that's right in the center of the femoral head, ***just exactly where the basic outline of what the MRI shows, that area***. There was a pathology going on at that point.
>
> Q. So is that . . . the area where the most bone death had occurred?
>
> A. Yeah, that's where everything above that basic line there pretty much died, and then, therefore, once it got weaker, it just collapsed, and that was kind of the end of the hip.
>
> . . .
>
> A. Well, in retrospect, if you put the MRI right next to the [2012] X-ray, the location and even the undulation of where this fracture line and avascular necrosis superior to it, which the blood supply comes from the inferior aspect of the femoral neck up into the head, so it's only basically a one-directional supply for the most part. . . .
>
> So reality is, once you have a fracture across there, then you disrupt the blood supply, and it actually takes, basically, time. It's trying to heal, but it fails, and then it starts getting softer, then starts collapsing, and then two years later I've seen the results of that where it actually starts to destroy the rest of the joint because she is still walking on it. (Messner depo, at 16-17).

9. Dr. Messner also explained that the timeline for development of osteonecrosis in this case supports his opinion regarding causation. As a general rule, osteonecrosis can take up to five years to develop following a hip trauma. Here, Claimant developed symptoms of true hip pathology inside of 20 months following her fall. On the evidence presented, the ALJ concludes that Claimant's osteonecrosis developed well within the window of time expected following her initial trauma. The speed with which osteonecrosis develops is influenced by the degree of trauma. According to Dr. Messner, a high-energy displaced fracture is likely to progress to

osteonecrosis much more rapidly than does osteonecrosis from lower impact trauma causing, as found here a non-displaced fracture.

10. Finally, Dr. Messner testified that outside of trauma, Claimant has none of the other well known risk factors associated with the development of osteonecrosis. Studies have shown osteonecrosis can be associated with systemic steroid use (such as prednisone), smoking, excessive alcohol consumption, diabetes, radiation treatment, pregnancy and sickle-cell anemia. None of those risk factors are present in Claimant's case leading to Dr. Messner's opinion that her osteonecrosis developed after the blood supply to the femoral head was disrupted by her fall and subsequent femoral head fracture.

11. Based upon a totality of the evidence presented, the ALJ concludes that the opinions of Dr. Messner are more persuasive than the contrary opinions of Dr. Larson. Dr. Larson conceded that trauma is a well-established risk factor for the development of osteonecrosis, but that only "high-energy" trauma involving displaced fractures or fracture-dislocations were sufficient to cause osteonecrosis because those injuries will disrupt blood flow to the head of the femur. Dr. Larson opined that the "trauma" in this case was "insufficient" to cause such disruption, that he has not seen a case where a low energy fall caused osteonecrosis and that the mainstream orthopedic literature does not describe such a catalyst for the development of osteonecrosis. On the other hand, Dr. Messner explained, osteonecrosis frequently develops after less severe trauma, including non-displaced fractures, and subluxation of the hip joint such as being tackled from behind in football. According to Dr. Messner, anything that disrupts the blood supply to the femoral head can lead to osteonecrosis, a fact with which Dr. Larson apparently agrees. Based upon the evidence presented, the ALJ concludes that Claimant's August 6, 2010 fall, more probably than not, resulted in a non-displaced femoral head fracture causing disruption in the blood supply to the femoral head setting the stage for Claimant's eventual development of osteonecrosis and subsequent need for a hip replacement procedure. In so concluding, the ALJ credits the testimony of Dr. Messner to find that, with the benefit of hindsight, the clinical picture over time is consistent with slow and incomplete healing from the initial injury, likely due to disrupted blood supply, followed by progressive bone death and eventual joint destruction caused by osteonecrosis, all culminating in the need for a right hip arthroplasty. Accordingly, Claimant has met her burden to prove that her need for medical treatment for the right hip flows proximately and naturally from her August 6, 2010 industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The Claimant's right hip osteonecrosis is a compensable component of her August 2010 injury.

2. Respondents shall pay all reasonable and necessary medical benefits related to Claimant's right hip, including the cost of the right total hip arthroplasty.

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.

DATE: 9/28/15

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, CO 80906