ISSUES

- Did Claimant prove by a preponderance of the evidence that the admitted industrial injury of January 3, 2014 proximately caused injuries to his neck and back?

- Did Claimant prove by a preponderance of the evidence that he needs reasonable and necessary medical treatment for the alleged injuries to his neck and back?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 through 18 were admitted into evidence. Respondents' Exhibits A through R were admitted into evidence. The depositions of Anthony Euser, M.D., Amit Agarwala, M.D., and Rachel Basse, M.D. were admitted into evidence.

2. On January 3, 2014 Claimant sustained admitted injuries while working for the Employer at Ivinson Memorial Hospital (IMH) in Laramie, Wyoming. The dispute in this case concerns whether or not the January 3 accident caused injuries to Claimant's neck and back.

CLAIMANT'S TESTIMONY

3. Claimant testified as follows concerning the events of January 3, 2014. Claimant was employed as a "helper" at the IMH work site. Claimant's foreman, who weighed approximately 300 pounds, was standing at the top of a 28 foot extension ladder holding the upper end of a "panel" while Claimant held the bottom of the panel. The foreman shouted at Claimant to "watch out" and Claimant saw the shadow of something coming towards him. The ladder then "swung around" with the foreman still at the top. A rung of the ladder then struck the Claimant three times in the face causing his head to "shoot back." The weight of the ladder and the foreman then crashed down on Claimant's body. Claimant fell backwards with the weight of the ladder and foreman on top of the Claimant.

4. Claimant testified that he felt "tons of pain" everywhere including his face, neck and low back. Claimant experienced the low back pain where his tool belt and hammer "jabbed" him as he fell down.

5. Claimant testified as follows concerning a January 16, 2013 industrial injury that he sustained while working for the Employer. He fell off of a roof and hit his head. He injured his neck, back, head, right hip, right jaw, right ear and tail bone. As a result of the head injury he still has difficulties with memory and speech.

6. Claimant recalled that he was eventually placed at maximum medical improvement (MMI) for the 2013 industrial injury. When placed at MMI he had no ongoing neck pain. However, he experienced occasional ongoing low back pain in the area of the tail bone. Claimant described this pain as lower than the back pain he experienced after the January 3, 2014 injury.

7. Claimant requested a Division-sponsored independent medical examination (DIME) to challenge the authorized treating physician's (ATP) determination that he reached MMI for the 2013 injury and the impairment rating issued by the (ATP). Claimant testified the ATP did not assign any impairment rating for his neck and back, but he did receive a 28% impairment rating for his right ear.

8. Before a DIME was conducted Claimant settled the claim for the 2013 industrial injury. The settlement documents reflect that claimant alleged he sustained injuries to his back, neck, head, brain mouth, jaw, ears and other body parts in the January 16, 2013 industrial injury. The Claimant received $30,000 in settlement of the claim. The settlement was approved by Order of the Director of the Division of Workers' Compensation dated December 6, 2013.

EVIDENCE CONCERNING TREATMENT FOR JANUARY 16, 2013 INDUSTRIAL INJURY

9. On January 13, 2013 Claimant underwent a CT scan of the cervical spine. The radiologist's impressions included "loss of normal cervical lordosis, possibly related to a cervical stabilization collar, and C5-6 disc space degeneration leading to probable mild bilateral foraminal stenosis.

10. Following the January 2013 industrial injury Linda Mitchell, M.D., acted as Claimant's authorized treating physician. Dr. Mitchell is level II accredited.

11. Dr. Mitchell first examined Claimant on February 13, 2013. Dr. Mitchell noted a history that Claimant fell off of a roof and sustained a "traumatic brain injury, subarachnoid hemorrhage, epidural hematoma, and pulmonary contusions." Claimant's chief complaints were rib pain, dizziness and headaches. Claimant also reported some "mid and lower back pain" that was improving with therapy. Dr. Mitchell assessed the following: (1) Skull fracture with epidural hematoma; (2) Subdural hematoma; (3) Chest wall contusion; (4) Post-traumatic headache; (5) Lung contusion; (6) Vertigo.

12. On March 1, 2013 Claimant's chief complaints were headaches, dizziness, chest wall pain and low back pain. Claimant reported that he recently experienced spontaneous pain "shooting from his shoulder to his right hand."

13. On March 15, 2013 Claimant reported to Dr. Mitchell that his back pain was better with physical therapy (PT). On April 5, 2013 Claimant advised Dr. Mitchell that his back was improving "although he woke up with a knot in his neck."

14. On April 19, 2013 Claimant reported that his biggest concerns were "neck pain and jaw pain." Dr. Mitchell referred Claimant for chiropractic treatment of the neck and jaw.

15. On May 10, 2013 Claimant reported to Dr. Mitchell his neck pain was "much better after one chiropractic treatment" but he still had some pain and tightness. Claimant was still complaining of headaches, memory problems and jaw pain.

16. On May 17, 2013 Claimant sought treatment from Dr. Mitchell on "an urgent basis." Claimant reported severe headache, vertigo and nausea over the past two days. Dr. Mitchell prescribed PT and referred Claimant to Suzanne Kenneally, Psy.D., for a neuropsychological evaluation.

17. On May 29, 2013 Claimant reported to Dr. Mitchell that he experienced "left neck pain" that radiated to his left thumb and index finger and tingling in those digits. Claimant also reported left lower thoracic and lumbar pain that radiated to his lateral left thigh and sometimes to the right thigh and knee.

18. On June 4, 2013 Claimant reported to Dr. Mitchell that his vertigo was triggered by looking up and down. He also complained of low back spasms and neck pain and diffuse "lightning like pain throughout his body."

19. On June 19, 2013 Claimant advised Dr. Mitchell that his pain level was 6 on a scale of 10 (6/10), but Cymbalta had decreased some of his "lightening pains." Claimant also reported that his back pain was worse with standing for more than one hour and his tailbone pain was "worse with sitting." Claimant reported numerous other symptoms including jaw pain, vertigo, short term memory problems, bilateral wrist pain, shoulder pain and neck pain.

20. On June 18, 2013 Dr. Kenneally performed a neuropsychological evaluation of Claimant. Dr. Kenneally issued a written report on June 25, 2014. Dr. Kenneally took a history from Claimant, reviewed medical records and conducted psychological testing. Claimant reported to Dr. Kenneally that he had difficulties with spelling, speech, memory and maintaining his "train of thought in conversations." Claimant reported that his physical symptoms, from "worst to least" were: "neck pain and stiffness; vertigo 'always dizzy;' tailbone pain; TMJ pain; constant headache 'intensity varies over the day;' lower back pain with radiation down the left leg; left knee pain; left hand pain."

21. In the written report Dr. Kenneally noted Claimant's performance on the Test of Memory Malingering "indicated intentionally poor effort" that was "below the range of institutionalized Alzheimer's patients." Claimant also performed "below 95% of traumatic brain injury patients on the Word Choice subtest of the WAIS-IV" and "below

chance" on the "Rey 15 item test." Dr. Kenneally stated that in order to score at Claimant's level, "it is necessary to learn both the right and the wrong answers, and in real time, choose to provide the incorrect answer." Dr. Kenneally further stated that using "Laribee's statistical process" Claimant's "failure of three validity measures at this level has a 95% certainty of intentionally poor effort or malingering." Dr. Kenneally opined the Claimant's ability to intentionally choose the wrong answers represents a "complex cognitive task" indicating Claimant "was back at pre-injury baseline functioning regarding cognitive functioning." Dr. Kenneally reported Claimant's results on psychological tests are "associated with non-credible reporting of somatic and cognitive symptomatology." Dr. Kenneally recommended that "all medical treaters" obtain objective assessments of Claimant's "symptom reports."

22. On July 24, 2013, Claimant returned to Dr. Mitchell. Claimant reported pains in his elbows and knees, right ankle and foot pain and "electrical shocks" in his great right toe when driving. Dr. Mitchell reviewed Dr. Kenneally's June 25, 2014 report and discussed the report with Claimant. Dr. Mitchell told Claimant "it was Dr. Kenneally's and my impressions that he is malingering." Dr. Mitchell wrote that the conclusion Claimant was malingering was "consistent with his vague, varied and subjectively worsening complaints over the past month or so." Dr. Mitchell placed Claimant at MMI without impairment and without restrictions.

23. On October 17, 2013 Thomas Politzer, O.D., examined Claimant. Claimant reported that vertigo was still an issue and that he was "intermittently bumping into objects." Claimant stated his headaches were improving but were "still quite impairing." Dr. Politzer noted that Claimant "remains with pain in his back and his hips."

EVIDENCE CONCERNING TREATMENT FOR JANUARY 3, 2014 INJURY

24. After the January 3, 2014 injury Claimant was taken to the IMH emergency room (ER) for treatment. Claimant was first examined by Gary Pearson, M.D., at 10:32 a.m. The ER notes reflect a history that Claimant was struck in the face by a ladder and absorbed most of the trauma to his face. Claimant did not lose consciousness. Claimant sustained "obvious facial injuries with lacerations of his nose, especially the tip of his nose." Claimant did not have any other apparent injuries. The Claimant was placed in a cervical collar, but on physical examination (PE) the cervical spine was "non-tender and there [was] no pain with active range of motion." There was no "thoracic or lumbar spine or paraspinal tenderness." Hydromorphone (Dilaudid) was first administered to Claimant at 10:50 a.m. After consultation Dr. Pearson decided Claimant should be transferred to the Medical Center of the Rockies (MCR) trauma unit in Loveland, Colorado.

25. While still at IMH on January 3, 2014 Claimant underwent a CT scan of the cervical spine. The radiologist noted the following: (1) Mild degenerative changes of the cervical spine but no evidence of acute fractures or subluxations; (2) Bulging discs from C3 through C7; (3) Straightening of the normal cervical lordosis which "may be

related to muscle spasm." Dr. Pearson also reviewed the cervical CT scan and described the results as "normal except for some multi-level DJD."

26. Claimant was seen at the MCR ER on January 3, 2014. He was evaluated by Eric Olsen, M.D. Dr. Olsen noted Claimant's neck was non-tender and there was no "evidence of C-spine injury by trauma." Claimant was admitted to the "Trauma Service" where he was evaluated by Steven Dubs, M.D. Claimant's admission diagnoses included multiple trauma, multiple facial fractures, nasal laceration, hypoxia, tobacco abuse and reactive airway. On PE Claimant's back was non-tender and his neck exhibited full range of motion (ROM) without tenderness. Aric Murphy, D.D.S., M.D., evaluated Claimant the on January 4, 2014. He noted that during his neurologic exam, the "C-spine was clear" and there was "no evidence of C-spine damage." Dr. Murphy sutured or otherwise treated several facial wounds. Claimant was discharged from MCR on January 5, 2014.

27. On January 6, 2014 Heather Roth, PA-C evaluated Claimant at Injury Care of Colorado (ICC). On this date PA-C Roth's review of symptoms reflects that Claimant reported "irritation and vision change." However, review of symptom does not mention that Claimant reported neck or back pain. On PE PA-C Roth recorded Claimant's neck was "supple" with full ROM. The back demonstrated "normal curvature." PA-C Roth noted abrasions on the bridge and tip of Claimant's nose and bilateral retinal hemorrhage. She also noted that Claimant had "painful cervical range of motion." PA-C Roth assessed an injury of the head, face and neck. She referred Claimant for an ophthalmology examination.

28. On January 9, 2014 Dr. Dubs examined Claimant. At that time Dr. Dubs noted the Claimant's neck exhibited normal ROM and was "supple." The musculoskeletal system exhibited normal ROM and Claimant did not exhibit any edema.

29. On January 10, 2014, PA-C Roth again evaluated Claimant. Claimant reported symptoms of eye irritation, visual disturbances, nose/sinus problems, chipped teeth, muscle aches, arthralgias/joint pain, back pain without weakness, dizziness and frequent headaches. On PE Claimant exhibited full ROM in the neck but there was pain with cervical ROM. The thoracolumbar spine demonstrated "normal curvature."

30. On February 3, 2014 PA-C Roth conducted another examination. Claimant reported symptoms of eye irritation, visual disturbances, runny nose and sinus pressure, dizziness and frequent headaches. There is no mention that Claimant experienced pain with cervical ROM. On examination the neck was supple with full range of motion. The Claimant reported no back pain and the thoracolumbar spine demonstrated "normal curvature."

31. On February 12, 2014 Peter Schmid, D.O., evaluated Claimant concerning surgical revision of his facial scarring. Claimant reported to Dr. Schmid that he was experiencing "neck discomfort since the" January 3, 2014 injury. Claimant also reported some paresthesias to the left upper arm and "generalized neck tenderness." Dr. Schmid noted Claimant's history of discogenic disease and recommended he be

evaluated by a spine surgeon. Dr. Schmid also recommended that claimant undergo "reconstructive septorhinoplasty and possibly an alar rim graft, as a well as "dermabrasion of the nasal scars." Dr. Schmid wrote that he "would first like to have cervical clearance prior to any surgical intervention."

32. On February 14, 2014 PA-C Roth conducted another examination. Claimant again reported symptoms of eye irritation, visual disturbances, runny nose and sinus pressure, dizziness and frequent headaches. Claimant also reported pain in the cervical spine with numbness radiating into the upper extremities and low back pain. On PE PA-C Roth noted tenderness of the paracervicals and tenderness of the C3 transverse process. She also noted tenderness of the C3 through C7 spinal processes and that left and right lateral flexion was limited to 5 degrees. PA-C Roth wrote that Claimant demonstrated a "new onset neck pain, numbness and burning sensation in shoulders radiating down L>>R arm, occasional shooting pain/stinging – neck injury believed to be a r/t whiplash from ladder/man falling on patient." PA-C Roth referred Claimant for bilateral EMG nerve conduction studies to assess the "radicular symptoms."

33. On April 8, 2014 Kathryn Polovitz, M.D., performed the bilateral upper extremity EMG and nerve conduction studies. Dr. Polovitz reported that the studies showed evidence of mild left ulnar neuropathy at the elbow, but no electrophysiologic evidence of any cervical radiculopathy. Dr. Polovitz recommended Claimant wear an elbow pad at night. She further noted that Claimant's examination demonstrated muscle spasm in the paraspinal muscles that "is most likely consistent with a whiplash injury."

34. On April 18, 2014 Christi Burge FNP-C examined Claimant at ICC. Claimant reported sharp "thoracic pain" rated 8/10. He also reported neck pain rated 7/10. FNP-C Bruge assessed cervical radiculopathy and referred claimant for an MRI of the cervical spine and for PT. FNP-C Bruge also assessed low back pain.

35. On April 26, 2014 Claimant underwent a cervical MRI. The radiologist's impression was "multilevel degenerative changes of the cervical spine" greatest in severity at C5-6. At C5-6 the radiologist noted moderate to severe disc space narrowing with posterior disc-osteophyte complex more prominent right posterolaterally causing central canal stenosis. The complex also encroached on the right lateral recess and there was mild right foraminal stenosis. The C6-7 and C7-T1 levels were normal.

36. O May 8, 2014 Claimant commenced a course of PT for treatment of cervical complaints.

37. On May 16, 2014 PAC-Roth noted Claimant continued to have neck pain with numbness and burning radiating into the upper extremities. She further noted that low back pain was "causing a lot of pain and radicular sxs in L4-L5-S1 region." PAC-Roth referred Claimant for a lumbar MRI.

38. On May 22, 2014 orthopedic surgeon Amit Agarwala, M.D., evaluated Claimant for "cervical spine pain." Claimant gave a history that he experienced the onset of neck pain five months ago, the pain was severe and it had not changed. Claimant also reported that the pain was radiating into the right arm. Dr. Agarwala reviewed the cervical MRI and performed a PE. Dr. Agarwala stated that the MRI showed a right "C6-7 HNP." He noted a positive Spurling's test on the right. Dr. Agarwala recommended Claimant undergo a cervical fusion at C5-6 "as he has failed 5 months of conservative treatment."

39. On May 29, 2014 Claimant underwent a lumbar MRI. The radiologist's impressions were: (1) Left paracentral and lateral disc extrusion at T12-L1 causing mild narrowing of the inferior aspect of the left neural foramen; (2) Mild diffuse disc bulge at L4-5 without evidence of stenosis; (3) Mild facet arthropathy at L5-S1.

40. On June 6, 2014 Rachel Basse, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Basse is board certified in physical medicine and rehabilitation and pain medicine. She is level II accredited. In connection with the IME Dr. Basse took a history from Claimant, reviewed pertinent medical records and performed a PE.

41. Claimant reported to Dr. Basse that he sustained injuries on January 16, 2013 and January 3, 2014. Claimant stated that when the ladder fell on him in January 2014 he felt "extreme severe pain in his face and neck" and also pain in his low back where "his tool belt was jabbing him." Claimant also told Dr. Basse that his "low back soreness" began while he was hospitalized at MCR in Colorado. Claimant could not remember when his upper extremity symptoms began but thought they also started during the MCR hospitalization. Claimant stated his cervical pain fluctuated between 7-8/10 and 9/10. He also reported random shooting pains in his arms that he describes as feeling like a "lightning bolt." He rated his low back pain as fluctuating between 3/10 and 6/10. Claimant reported his neck and low back pain from his 2013 claim resolved at the same time Dr. Mitchell released him from care.

42. Dr. Basse noted Claimant had multiple "musculoskeletal symptoms" after the January 2013 injury. Dr. Basse opined these symptoms were "variable and odd in description and appear to reflect a symptom concern." Dr. Basse stated that her observations were "consistent with the diagnosis of Pain Disorder as noted by Dr. Kenneally."

43. Dr. Basse wrote that when determining "medical legal causality" a physician must consider "mechanism, diagnosis, ability of mechanism to cause diagnosis, temporal relationship and presence of other more biological plausible explanations."

44. Dr. Basse addressed the cause of Claimant's neck and upper extremity symptoms after the January 3, 2014 injury. Dr. Basse noted that according to the medical records available to her "cervical and upper extremity symptoms" were first documented on February 12, 2014. Dr. Basse opined that the report of these symptoms

greater than one month and one week after the January 3, 2014 injury "does not represent a temporal relationship needed to establish causality." Dr. Basse stated she might change her opinion if unavailable medical records showed Claimant had cervical and upper extremity symptoms on January 17, 2014. Dr. Basse also opined that the diagnosis of Claimant's neck symptoms is "unclear." Dr. Basse noted the cervical MRI showed "moderate to severe degenerative changes at C5-6" with "central stenoisis." However, Dr. Basse stated Claimant's PE was not consistent with central stenosis at C5-6, and he was non-tender at that level. Dr. Basse also opined Claimant had no clinical signs of upper extremity radiculopathy, which is consistent with the normal EMG. Dr. Basse also opined that the MRI findings may be incidental and/or old findings. She further opined that Claimant's 2013 mechanism of injury (falling on his head) is more consistent with his MRI findings than the 2014 mechanism of injury.

45. Dr. Basse opined Claimant is not a good candidate for surgery given his reports of high pain levels that are inconsistent with his presentation, normal physical exam, normal EMG, negative Spurling's and minimal treatment without patient education to date.

46. Dr. Basse addressed the cause of Claimant's low back pain after the January 3, 2014 injury. Dr. Basse stated that the medical records do not mention low back pain "for the first three and-a-half months after" the date of injury. Dr. Basse opined there was no relationship in time to the on-the-job injury and, therefore, not causally related." Dr. Basse also stated that on her examination Claimant's symptoms were "more thoracolumbar than lumbosacral and may be related to MRI findings." However, Dr. Basse explained that Claimant had "symptoms in this area prior to 01/03/14 and continuation represents a more biologically plausible explanation for his current symptoms."

47. On June 20, 2014 PA-C Roth noted Claimant continued to have neck pains, numbness and burning in the shoulders radiating down the upper extremities and low back pain and radicular symptoms in the L4-5 and L5-S1 region. PA-C Roth noted the spinal surgeon would not perform surgery until the Claimant quits smoking and the "ENT will not perform nasal surgery until spinal surgery" is complete.

48. On July 25, 2014 PA-C Roth noted that Claimant had undergone an "IME" because the "insurance believes the neck injury was not from his most recent accident." PA-C Roth opined that if this is the case Claimant's "old claim should be reopened." PA-C Roth further noted that the IME had "questioned malingering" but Roth stated the MRI showed "central canal stenosis" that "clinically correlated" with his symptoms. PAC-Roth further stated that: "IME stated that neck injury was not mentioned until 1 month post-injury but I suspect this was because [Claimant] had several injuries that required more immediate attention." PA-C Roth transferred Claimant's care to Anthony Euser, D.O., because Roth was "unable to get [Claimant's] issues addressed."

49. On August 15, 2014 Edwin Healey, M.D., performed an IME at Claimant's request. Dr. Healey is board certified in occupational medicine/neurology. He is level II accredited. In connection with the IME Dr. Healey took a history from Claimant,

reviewed pertinent medical records and performed a PE. Dr. Healey reviewed Dr. Basse's IME report.

50. Dr. Healey diagnosed numerous conditions that he believes are related to the January 3, 2014. Among these diagnoses are; (1) Post-traumatic headaches due to nasal injury and cervical sprain/strain; (2) Cervicobrachial myofascial pain with secondary headaches; (3) Intermittent cervical pain, with MRI showing multilevel degenerative changes, particularly at C5-C6, with encroachment of a posterior disc-osteophyte complex on the right lateral recess; (4) Chronic low back pain, with MRI showing left paracentral lateral disc protrusion at T12-L1 causing mild narrowing of the inferior aspect of the left neural foramen and evidence of facet arthropathy at L5-S1 and mild diffuse disc bulge at L4-5.

51. Dr. Healey noted that Claimant gave a history that he reported cervical pain and intermittent right upper extremity problems throughout his clinical course, but there was a "delay" in treatment. Dr. Healey observed that PA-C Roth's note dated January 6, 2014 states Claimant had painful cervical ROM, and that PA-C Roth documented the same complaint on January 10, 2014. Dr. Healey further noted that on February 14, 2014 PA-C Roth recorded both "low back pain and intervertebral disc disorder of the cervical region." Based on Dr. Healey's observations the ALJ infers that Dr. Healey believes there is a sufficient temporal relationship between the January 3, 2014 injury and the subsequent cervical and low back complaints to conclude there is a causal relationship between them.

52. Dr. Healey opined Claimant has not reached MMI for the January 2014 industrial injury. With regard to the cervical and upper trapezius myofascial pain and secondary headaches Dr. Healey opined Claimant would "benefit from a trial of occipital nerve blocks and upper trapezius trigger point injections followed by deep tissue massage." If Claimant benefits from these therapies Dr. Healey recommends that Claimant obtain a second opinion as to whether surgery is appropriate.

53. Concerning Claimant's low back pain Dr. Healey opined there are "both subjective and objective findings plus a specific causal factor, i.e., falling on his tool belt over the T12-L1 area." Dr. Healey opined that this "area of pain may have been preexisting, but it certainly has been permanently aggravated by" the January 3, 2014 injury. Dr. Healey recommended Claimant receive further treatment for his back to include epidural steroid injection and a lumbar facet block.

54. Dr. Healey noted that he was "surprised" that "so much weight" was given to Dr. Kenneally's neuropsychological evaluation in determining that Claimant was "not eligible for higher impairment for his other multiple problems, including headaches and cervical and thoracolumbar pain after his January 16, 2013, injury."

55. On August 26, 2014 Dr. Euser saw the Claimant at ICC. Dr. Euser noted Claimant was present for follow-up of a "nasal fracture, neck pain and disc disorder in the low back, an injury that occurred while at work on" January 3, 2014. Claimant reported he was experiencing neck pain, back pain and headaches. Dr. Euser did not

record any PE results. Dr. Euser noted that PA-C Roth reviewed Claimant's records from the January 16, 2013 injury and believed that Claimant's symptoms were related to the January 3, 2014 injury. Dr. Euser agreed with PA-C Roth that Claimant's symptoms were related to the January 2014 injury. Dr. Euser referred Claimant to Dr. Agarwala for treatment of his back. Dr. Euser also referred Claimant for additional PT to treat the neck pain.

56. Dr. Euser again saw Claimant on September 30, 2014. Claimant reported that the pain in his neck and lower back was getting worse. On PE Dr. Euser noted reduced ROM in the cervical and lumbar spine, tenderness of the right and left transverse processes at L1 and "abnormal spasm." Dr. Euser stated the Claimant needed to follow-up with Dr. Agarwala "to get clearance to have his nose surgery." Dr. Euser recommended Claimant start PT for low back pain.

57. On December 2, 2014 Dr. Euser wrote the Claimant felt like "he is getting worse and worse due to the insurance company denying everything." Dr. Euser further stated that "the insurance company has denied everything for this case that we have tried to put in."

DEPOSITION TESTIMONY OF DR. EUSER

58. Dr. Euser testified by deposition on May 7, 2015. Dr. Euser is board certified in family medicine and level II accredited.

59. Dr. Euser testified that he has been unable to get approval for Claimant to return to the orthopedic surgeon. Dr. Euser stated that Claimant needs to be examined for his cervical and lumbar spine, although the "biggest" concern is with the cervical spine. Dr. Euser explained the Claimant needs to return to the orthopedic surgeon to get cervical "clearance" for the ENT physician to perform nasal surgery and to determine whether Claimant's spine exhibits any operable condition.

60. Dr. Euser testified extensively concerning the cause of the Claimant's alleged cervical and back injuries. Dr. Euser acknowledged that he had not reviewed all of the medical records pertaining to Claimant's January 2013 injury and couldn't specifically identify what records he had reviewed. Dr. Euser was generally aware that Claimant had reported cervical and lower back pain in connection with the 2013 injury.

61. Dr. Euser testified he had some conversation with Claimant concerning symptoms associated with the January 2013 injury but had not "gone into marked detail on that." Dr. Euser opined that when determining the cause of Claimant's symptoms "it would help" to have a detailed discussion with Claimant concerning resolution of previous symptoms and the medical records generated prior to January 3, 2014. Dr. Euser stated that he believed Claimant told him the symptoms from the 2013 injury resolved prior to January 3, 2014 injury. However, there was no discussion as to precisely when the previous symptoms resolved.

62. Dr. Euser testified that he was "primarily relying on" Claimant's "subjective statement of symptoms" as the basis for concluding that Claimant has cervical and lumbar symptoms and that those symptoms appeared "contemporaneous with" the January 3, 2014 injury.

63. At the deposition Dr. Euser was presented with Dr. Kenneally's June 25, 2013 neuropsychological report. Dr. Euser did not recall seeing the report prior the deposition. After reviewing Dr. Kenneally's conclusions Dr. Euser testified the report caused him some level of concern in relying upon Claimant's subjective complaints. Dr. Euser also reviewed Dr. Mitchell's July 24, 2013 report in which Dr. Mitchell agreed with Dr. Kenneally that the Claimant was malingering. Dr. Euser testified that Dr. Mitchell's opinion caused him to "become more suspicious" concerning the "origin" of Claimant's "neck and back injury component."

64. Dr. Euser agreed the January 3, 2014 IMH ER record documenting that Claimant's cervical spine was non-tender and there was no pain with active ROM does not correspond with Claimant's "subjective" report that he suffered immediate neck pain at the time of the injury. He also agreed the MCR records showing a pain free ROM without tenderness constitute evidence that Claimant was not complaining of neck pain.

65. At the deposition Dr. Euser was shown several March 24, 2015 surveillance video clips taken of Claimant while at work. Dr. Euser testified the surveillance video depicted Claimant exhibiting greater cervical and lumbar ROM than he demonstrated during Dr. Euser's 2015 clinical examinations. Dr. Euser testified the surveillance video caused him concern as to the "validity" of Claimant's presentation on PE. Dr. Euser further testified the video shows that Claimant did not have any apparent functional deficits. Dr. Euser testified that, "we wouldn't want to do surgery on someone who's functional."

66. Dr. Euser stated that Claimant first complained of upper extremity symptoms on February 14, 2014. Dr. Euser opined the lapse of time between January 3, 2014 and February 14 would be at the "long range" of when he would expect symptoms to appear if they were related to the January 2014 injury. Dr. Euser also acknowledged that on January 6, 2014 PA-C Roth documented pain with cervical ROM.

DEPOSITION TESTIMONY OF DR. AGARWALA

67. Dr. Agarwala testified by deposition on May 12, 2015. Dr. Agarwala is board certified in orthopedic surgery and performs many surgeries including spinal surgeries.

68. Dr. Agarwala stated that he examined the Claimant on May 22, 2014 and had reviewed his office note from that date. Dr. Agarwala had no specific recollection of examining the Claimant. Dr. Agarwala reviewed the cervical MRI and stated that it evidenced a right-sided herniated disc at C6-7 and mild degenerative changes at C5-6 and C6-7. Dr. Agarwala assessed cervical radiculopathy.

69. Dr. Agarwala testified that he doesn't know what caused the Claimant's radicular pain but he stated that a ladder falling on the Claimant "with a heavy person, heavy enough to fracture the nose certainly is reasonable to suggest that may have led to [Claimant's] symptoms." Dr. Agarwala stated that the "timeline of [Claimant's] symptoms is a better way to discern causation" and opined that "if his symptoms started after an injury it is reasonable to assume the two are related." Dr. Agarwala also stated it wouldn't be unusual for "complain of arm pain" until several months after the date of injury.

70. On cross-examination Dr. Agarwala stated that his notes do not "reflect the history and timeline of [Claimant's] pain presentation" and therefore he was not "really able to" express an opinion on the cause of Claimant's neck and arm pain.

71. Dr. Agarwala testified that the spinal surgery he has recommended is reasonable and necessary to treat Claimant's symptoms. Dr. Agarwala admitted that when he proposed surgery he believed Claimant had failed 5 months of conservative treatments such as PT, injections, chiropractic, massage and electrical stimulation. Dr. Agarwala testified that typically he would not recommend surgery unless a patient had failed at least three months of conservative treatment.

DEPOSITION TESTIMONY OF DR. BASSE

72. Dr. Basse testified by deposition on May 21, 2015. In connection with her testimony Dr. Basse reviewed medical records developed after the date of her IME as well as the depositions of Dr. Euser and Dr. Agarwala,

73. Dr. Basse opined that the Claimant did not sustain any neck or back injuries as a result of the January 3, 2014 accident. She further opined that even if Claimant sustained injuries to his neck and/or back on January 3 the injuries were so minor that they did not require any medical treatment or cause any disability.

74. In contrast to her June 2014 IME report, Dr. Basse testified that medical records from ICC documented that Claimant reported neck pain on January 6, 2014, and back pain on January 10, 2014. However, these notations did not alter Dr. Basse's opinion that Claimant did not sustain any neck or back injuries on January 3, 2014. Dr. Basse explained that in her opinion comprehensive physical evaluations were performed at IMH and MCR, and that these examinations did not document any neck symptoms or abnormalities. Dr. Basse considered this significant since Claimant told Dr. Basse that after the ladder incident he experienced the immediate onset of neck pain. Dr. Basse noted that after January 3, 2014 Claimant's symptoms tended to wax and wane and tended to migrate from one upper extremity to the other. Dr. Basse pointed out that on January 9, 2014, three days after Claimant was first seen an ICC, he was examined by Dr. Dubs who noted normal cervical ROM and did not document any complaints of neck or back pain. Dr. Basse further pointed out that on February 14, 2014 claimant was seen by at ICC and PA-C Roth documented "new" complaints of neck pain with radiation into the upper extremities. Dr. Basse opined that because

these “new” symptoms were not related to the January 3, 2014 accident because they appeared more than a month after the date of injury.

75. Dr. Basse testified that Dr. Kenneally’s opinion that Claimant was malingering and the neuropsychological report documenting Claimant’s failure on “three separate validity measures” causes her to “cautiously” interpret Claimant’s reports of subjective symptoms. Dr. Basse also stated that Dr. Mitchell’s opinion that the Claimant was malingering after the 2013 injury causes her to be cautious when interpreting the Claimant’s subjective symptoms in 2014. Dr. Basse also testified that Dr. Euser’s testimony concerning the differences between Claimant’s clinical presentation and his activities shown on the surveillance video is a “red flag” concerning the reliability of Claimant’s subjective complaints.

FINDINGS CONCERNING CAUSE OF NECK AND BACK CONDITIONS

76. Claimant failed to prove it is more probably true than not that he sustained any injuries to his neck and or back proximately caused by the admitted industrial injury of January 3, 2014. Claimant also failed to prove it is more probably true than not that the January 3, 2014 injury aggravated or accelerated any pre-existing condition or conditions.

77. The Claimant’s testimony that on January 3, 2014 he suffered the onset of severe neck and low back pain immediately after the ladder and coworker fell on him is not credible and persuasive. The ALJ notes that Claimant’s testimony concerning the immediate onset of neck and low back pain is similar to the history he gave to Dr. Basse when she examined him on June 6, 2014. However, as explained by Dr. Basse, Claimant’s statements that he experienced the immediate onset of neck and back pain are contradicted by the IMH and MCR emergency room reports that were recorded on January 3, 2014. Neither of these reports documents any reports or findings of pain or injury to the neck and/or low back. To the contrary, these reports demonstrate that on January 3 the neck and back were examined at both hospitals and there was no report of symptoms and no abnormalities observed by the examiners. The ALJ finds it implausible that Claimant actually experienced the onset of severe neck and low back symptoms immediately after the ladder incident but failed to report these symptoms at the IMH and MCR emergency rooms.

78. Claimant argues that the ALJ should infer there is persuasive temporal relationship between the January 3, 2014 injury and Claimant’s subsequent report of neck symptoms on January 6, 2014 and the report of low back symptoms on January 10, 2014. However, the ALJ declines to draw such an inference. First, the suggestion that Claimant experienced a delayed onset of neck and back symptoms is contrary to his own testimony that the symptoms were severe and developed immediately after the accident.

79. Moreover, Claimant’s reports of neck and low back symptoms after January 3, 2014 are not credible and cannot be relied upon to establish a temporal relationship to the January 3, 2014 injury. Dr. Basse credibly and persuasively opined

that that from a medical perspective Claimant's subjective reports of neck and low back symptoms are not reliable. Dr. Basse credibly explained that she would be very "cautious" in relying on Claimant's reports of symptoms because he was diagnosed as a malingerer after the 2013 injury and failed three validity tests on neuropsychological testing. Dr. Basse also credibly opined that Dr. Euser's testimony that Claimant's clinical presentation significantly differed from the activity level shown on the surveillance video presents a "red flag" concerning Claimant's reliability.

80. Dr. Basse credibly opined that there is not a persuasive temporal relationship between the onset of Claimant's neck and back pain symptoms and the January 3, 2014 industrial injury. As pointed out by Dr. Basse in her IME report, in determining causation a physician must consider the temporal relationship between the occurrence of the injury and the development of symptoms allegedly caused by the injury. Dr. Basse explained that here the Claimant did not report any neck symptoms to PA-C Roth until January 6, 2014, and did not mention any back symptoms to PAC-Roth until January 10, 2014. However, when Claimant was examined by Dr. Dubs on January 9, 2014, the neck exhibited full ROM and there was no mention of any neck or back symptoms. It was not until February 14, 2014, more than a month and a week after the alleged date of injury, that PAC-Roth reported the Claimant had "new" symptoms of neck pain with radiation into the upper extremities. After January 10, 2014, the medical records do not document any reports of low back pain until February 14, 2014.

81. Dr. Basse's opinion that the medical records do not document any consistent reports of neck and back pain after January 3, 2014 is corroborated by PA-C Roth's records from the February 3, 2014 examination. On February 3 PA-C Roth did not document any reports of back pain or neck pain. Instead, PA-C Roth noted Claimant's neck was supple with full ROM and there was no mention of pain. It was not until February 12, 2014 that Dr. Schmid again documented neck pain with "paresthesias to the left upper arm."

82. Moreover, Dr. Basse correctly noted Claimant that prior to January 2014 Claimant had reported neck and back pain in connection with the January 2013 injury. Indeed, the settlement documents show that Claimant alleged he had sustained neck and low back injuries in the 2013 incident. The 2013 medical records also show complaints of low back pain, neck pain and pain radiating into Claimant's upper extremities. On October 17, 2013, less than 3 months prior to the January 2014 injury, Claimant told Dr. Politzer he had hip and back pain.

83. The ALJ is not persuaded by Dr. Healey's opinion that Claimant's low back, neck and upper extremity symptoms were caused by the January 3, 2014 injury, or at least by a January 3 "aggravation" of some pre-existing condition(s). Dr. Healey's opinion appears to be based in part on Claimant's assertion that he reported all of these symptoms throughout the course of his treatment after January 3, but treatment was delayed. However, Dr. Healey does not persuasively explain why Claimant did not report these symptoms at the two emergency rooms where he was seen on January 3, 2014. Further, the emergency room records do contain any mention that Claimant fell

on his tool belt as he told Dr. Healey. Dr. Healey did not persuasively explain why the medical records show that after January 3, 2014 Claimant reported symptoms on some occasions and not others. Further, contrary to Dr. Healey's opinion, the ALJ is persuaded by the testimony of Dr. Basse and Dr. Euser that the results of the 2013 neuropsychological testing are a significant medical factor to be considered when determining whether Claimant's 2014 reports of symptoms should be relied upon when evaluating the cause of the symptoms.

84. To the extent Dr. Euser opined that Claimant's neck, upper extremity and low back symptoms are causally related to the industrial injury of January 3, 2014, the ALJ finds Dr. Euser's opinion is not persuasive. Dr. Euser admitted at his deposition that he had little familiarity with records documenting Claimant's treatment for the 2013 injury. Dr. Euser also testified that when evaluating the cause of Claimant's symptoms he relied on Claimant's subjective report that the symptoms appeared contemporaneously with the January 3 incident. However Dr. Euser admitted that prior to the deposition he was unaware of the 2013 neuropsychological testing that showed evidence of malingering, and he was also unaware of Dr. Mitchell's opinion that Claimant was malingering. Dr. Euser admitted that he considered this information to be significant when evaluating the reliability of Claimant's reported symptoms after the January 3, 2014 accident. Dr. Euser also testified that video surveillance showed Claimant performing activity that was inconsistent with his clinical presentation and that this fact cast further doubt on the reliability of Claimant's reported symptoms.

85. To the extent that Dr. Agarwala opined that the January 3, 2014 incident could have caused Claimant's neck and upper extremity paint that opinion is given little weight. Similarly Dr. Agarwala's statement that it is reasonable to assume a causal relationship between the injury and symptoms if the symptoms began after the injury is given little weight. At his deposition Dr. Agarwala expressly declined to render any opinion concerning the cause of the Claimant's symptoms. At the deposition Dr. Agarwala admitted that he had not reviewed the medical records from the 2013 injury, and had reviewed only his own record concerning the January 2014 injury. Therefore, Dr. Agarwala does not have an adequate factual basis to render a persuasive opinion regarding the cause of Claimant's various symptoms.

86. To the extent Claimant relies on the causation opinions of PA-C Roth, the ALJ finds that Roth's opinions on the issue are not persuasive. There is no credible or persuasive evidence that PA-C Roth has been trained in applying the causation analysis required of a level II accredited physician. Further, the ALJ infers that Roth's opinions are not as persuasive as those of a physician trained in applying level II causation analysis.

87. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

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

CAUSE OF NECK, UPPER EXTREMITY AND LOW BACK SYMPTOMS

Claimant argues that he has established by a preponderance of the evidence that his neck, upper extremity and low back symptoms were proximately caused by the January 3, 2014 injury, or proximately caused by a January 3, 2014 aggravation of his pre-existing condition(s). In support of these arguments Claimant cites his own testimony and the opinions of Dr. Euser, PA-C Roth, Dr. Agarwala and Dr. Healey. Respondents argue Claimant's testimony is not credible and that the opinions expressed by Dr. Basse are the most persuasive.

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).

The ALJ concludes Claimant failed to prove it is more probably true than not that on January 3, 2014 Claimant sustained any injury or injuries to his neck and his low back. As determined in Findings of Fact 76 and 77, Claimant's testimony that he sustained the immediate onset of neck and low back pain as a result of the January 3, 2014 accident is not credible and persuasive. Claimant's testimony is inconsistent with the IMH and MCR emergency room reports.

As determined in Findings of Fact 78 through 82, the evidence does not establish a credible or persuasive basis for inferring that there is a meaningful temporal relationship between the Claimant's reports of neck and back symptoms and the January 3, 2014 injury. The ALJ has discredited Claimant's testimony that he experienced an immediate onset of neck and back symptoms after the ladder incident. Moreover, as determined in Findings of Fact 78 and 79, the evidence does not demonstrate Claimant experienced a "delayed" onset of symptoms because that inference is contrary to Claimant's own testimony.

Further, the ALJ has credited Dr. Basse's opinion that the medical records and testimony do not establish that there is persuasive temporal relationship between Claimant's reported symptoms and the January 3, 2014 injury. As determined in Finding of Fact 80, Dr. Basse credibly and persuasively opined that after January 3, 2014 Claimant did not report any neck symptoms until January 6, 2014, and did not report any back symptoms until January 10, 2014. Dr. Basse persuasively opined that the medical records do not document any such reported symptoms when Claimant was seen by Dr. Dubs on January 9, 2014 and that thereafter Claimant's symptoms tended to "wax and wane." Dr. Basse credibly explained that on February 14, 2014 Claimant reported "new" symptoms of neck pain radiating into the upper extremities. Most significantly Dr. Basse credibly opined that Claimant's subjective reports of symptoms cannot be relied upon when assessing causality. Dr. Basse explained that Claimant's unreliability is established by the evidence of malingering after the January 2013 injury and Dr. Euser's observation that Claimant's activity level on the surveillance video was inconsistent with Claimant's clinical examination. Dr. Basse's opinions were corroborated Dr. Euser who testified that the evidence of malingering in 2013 caused him to be "suspicious" of the "origin" of Claimant's symptoms in 2014 and to question the validity of Claimant's clinical presentation.

The ALJ notes that Claimant asserts in his position statement that the evidence of malingering in 2013 constitutes "improper character evidence." However, Claimant did not object to the admission of the malingering evidence and may not do so now because there was not contemporaneous objection. C.R.E. 103(a)(1).

For the reasons stated in Findings of Fact 83 through 86 the opinions of Dr. Healey, Dr. Euser, Dr. Agarwala and PA-C Roth are not persuasive insofar as they tend to suggest a causal relationship between the January 3, 2014 injury and Claimant's subsequent neck and back symptoms.

The claim for medical treatment of Claimant's neck and back symptoms is denied because Claimant failed to prove that these conditions were caused by the January 3,

2014 injury or that the January 3, 2014 injury aggravated or accelerated any pre-existing back or neck condition. In light of this determination the ALJ need not address the other issues raised by the parties.

ORDER

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

1. The Claimant failed to prove it is more probably true than not that his alleged neck and back conditions were proximately caused by the industrial injury of January 3, 2014. Therefore the claim for benefits, including medical benefits, based on the neck and back injuries is denied.

2. Issues not resolved by this order are reserved for future determination.

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

DATED: October 6, 2015

DIGITAL SIGNATURE:

David P. Cain

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

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ISSUE

1. Whether Claimant is entitled to temporary total disability benefits from March 27, 2015 and ongoing.

FINDINGS OF FACT

1. On June 18, 2014 Claimant began working part time for Employer in the position of floor staff. Claimant's job duties included pushing carts of parts around a warehouse and her job required standing, walking, reaching, lifting, and pushing/pulling. Claimant was scheduled to work 4-5 hour shifts, five days a week, for a total of approximately 20-25 hours per week. *See* Exhibit 3.

2. On June 27, 2014 Claimant suffered an injury to her right ankle. Claimant was pulling a metal cart full of car parts across the warehouse when she heard a forklift driver honk their horn. Claimant came stopped immediately and the cart she was pushing hit her right ankle.

3. Claimant was transported to University Hospital Emergency Room where she received stitches for an Achilles tendon laceration. Claimant later received treatment including wearing a boot for two months and undergoing physical therapy.

4. On June 28, 2014, Claimant was evaluated by Jennifer Huldin, M.D. Dr. Huldin assessed laceration of the lower leg and Achilles rupture. Dr. Huldin provided Claimant with a return to work release with restrictions of seated work only, requirement to wear boot, and included in the treatment plan that Claimant should elevate foot to the level of the heart or higher when seated and when sleeping. *See* Exhibit J

5. From the date of her injury and through February 19, 2015 Employer was unable to accommodate Claimant's restrictions. Claimant was off work, at home, and received temporary total disability (TTD) benefits.

6. On February 19, 2015 Claimant received a written offer of modified employment from Employer. The letter noted that they had matched her restrictions with an offsite light duty work opportunity allowing her to recondition herself without exceeding her limitations. The work was at Pinnacle Hospice Care and included light office work. The letter noted that although the light duty assignment was offsite at a local volunteer organization, Claimant remained an employee of Employer and the offer of modified employment was made by Employer. *See* Exhibit H.

7. On February 20, 2015 Claimant returned to modified employment. Claimant worked within her restrictions at Pinnacle Hospice Care through March 17, 2015. During this period of time, Claimant was paid wages by Employer and also continued to receive TTD benefits.

8. On March 16, 2015 Claimant was evaluated by Carrie Burns, M.D. Dr. Burns provided Claimant with a return to work release with restrictions of no climbing stairs or ladders. *See* Exhibit I.

9. On March 18, 2015 Claimant returned to work onsite at Employer's facility. Claimant continued to work in modified employment within her work restrictions. Employer had a policy requiring that employees in the warehouse wear steel toed boots. On March 27, 2015 Claimant reported to Employer that she was in pain due to the boots and needed to see her doctor before continuing working.

10. On April 6, 2015 Claimant was evaluated by Dr. Burns. Dr. Burns noted Claimant had increased pain due to her daughter being in the hospital and because Claimant was doing a lot more walking. Dr. Burns noted Claimant had seen Dr. Blau on March 11, 2015 and that he felt she may have CRPS. Dr. Burns noted that Claimant would hopefully be scheduled to undergo a thermogram and a triple phase bone scan soon. Dr. Burns continued Claimant's work restrictions of no climbing stairs or ladders and added the restriction of needing a 10 minute break every 2 hours to rest and elevate her foot. *See* Exhibit 1.

11. Claimant testified that at the April 6, 2015 appointment Dr. Burns advised her she had to either be completely off work or that she had to return to Pinnacle Hospice Care. Claimant's responses to interrogatories indicates that the intent of the doctor was that she either wouldn't work or would do alternative work at Pinnacle Hospice Care until she could get the results of the CRPS testing back and get a new treatment plan in place. Claimant's testimony and her response to interrogatories surrounding Dr. Burns' plan is inconsistent with Dr. Burns' medical report and the work restrictions that Dr. Burns provided on April 6, 2015.

12. On April 7, 2015 Claimant's supervisor spoke with Claimant via telephone and advised Claimant that Employer could continue to accommodate her in modified employment and that the one new restriction of needing a 10 minute break every two hours would be accommodated and that Claimant was expected to report to work the following day. Claimant understood this conversation and was aware that Employer would still accommodate her in her modified employment.

13. Claimant subjectively believed she was incapable of the work and incredibly believed that her work restrictions were much greater than what was provided by Dr. Burns on April 6, 2015.

14. On April 8, 2015 Claimant did not report to work.

15. Claimant indicated in her response to interrogatories that after the phone conversation with her supervisor, she attempted several times to contact Dr. Burns and left messages over the next few days but did not receive a call back. This is not found credible or persuasive. Claimant reported that after multiple attempts to contact her doctor to sort out her true work restrictions, she then received a letter stating that she had resigned from Employer so she found another job. *See* Exhibit D.

16. On April 14, 2015 Claimant's supervisor contacted Claimant and left a voice message regarding her absence from Employment. He also sent her an email. Claimant did not respond to the voice message or to the email.

17. On April 20, 2015 Claimant's supervisor sent Claimant a letter via certified mail. The letter provided that Claimant's lack of notification (3 day no call no show) constituted a voluntary resignation. The letter provided that Claimant's last day worked was March 27, 2015. The letter provided that Claimants' workers compensation claim remained open so that she could maintain treatment and provided that if she had questions to contact her supervisor. *See* Exhibit F.

18. On April 24, 2015 Claimant was evaluated by Dr. Burns. Dr. Burns provided continued work restrictions of no climbing stairs or ladders and provided the additional restriction of requiring a 10 minute break every hour to rest and elevate her foot, and noted that Claimant may work up to a 4 hour shift. Dr. Burns did not indicate in her report that Claimant had to be entirely off work or that Claimant had to return to work at Pinnacle Hospice Care. *See* Exhibit 1.

19. On May 10, 2015 Claimant began working part time for Melissa's Petsitting and More, LLC as a dog walker. Claimant walks 3-4 dogs per day with the walks averaging 23-27 minutes. She is able to perform this work within her work restrictions.

20. Despite returning to modified employment on February 20, 2015 and continuing to work in modified employment until March 27, 2015, Claimant was paid both wages and TTD benefits during this period of time.

21. Claimant has continued to receive TTD benefits from March 27, 2015 through the date of hearing in this matter despite beginning employment with Melissa's Petsitting and More, LLC on May 10, 2015.

22. Respondents are requesting termination of TTD benefits as of March 27, 2015 due to Claimant's responsibility for termination and argue that being absent for three or more shifts without proper documentation and failing to contact a supervisor violated company policy.

23. Employer's attendance policy provides that employees are required to be reliable and punctual when reporting for scheduled work. The policy provides that three infractions within 90 days for absenteeism or tardiness without proper documentation

are grounds for termination. It also provides that failure to contact your supervisor if you are going to be late or absent may result in immediate termination. *See* Exhibit L.

24. Claimant received a written offer of modified employment on February 19, 2015. She also had actual notice that her modified employment continued to be available to her after the one new work restriction she received on April 6, 2015. However, even after being advised on the phone that her modified employment continued, Claimant failed to show up for work or further contact Employer.

25. Claimant's testimony overall is not found credible or persuasive. Claimant's contention that Dr. Burns advised her at the April 6, 2015 appointment that she either needed to be completely off work or return to work at the Pinnacle Hospice Center is inconsistent with Dr. Burns' own medical report of April 6, 2015 where Dr. Burns only adds one minor additional work restriction of a 10 minute break every two hours (essentially once per Claimant's normal part-time shift). Additionally, Claimant's testimony is inconsistent with Dr. Burns' medical reports of April 24, 2015 where again Dr. Burns does not mention that Claimant was required to be completely off work or return to Pinnacle Hospice Care. Claimant's testimony that after she spoke with her supervisor on April 7, 2015 she attempted multiple times to contact Dr. Burns to clarify restrictions before receiving her termination letter April 20, 2015 is also not credible or persuasive .

26. Claimant's failure to report to work on April 8, 2014 despite having been told that her one new restriction would continue to be accommodated in her modified employment was unreasonable. Claimant's failure to contact her employer between April 8, 2014 and April 20, 2014 and failure to respond to Employer's voice message and email on April 14, 2014 was also unreasonable.

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. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing 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*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2013).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that 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); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions 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 the first occurrence of any one of the following: 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. § 8-42-105(3), C.R.S.

As a threshold issue, Claimant must establish an entitlement to TTD benefits. As found above, Employer made a modified employment offer to Claimant in writing on February 19, 2015. Claimant accepted this offer and returned from being entirely off work and from being totally disabled on February 20, 2015 when she began modified employment. On February 20, 2015, the provisions of §8-42-105(3)(b), C.R.S. were met and Claimant's *entitlement to* TTD terminated. Although Respondents continued to pay TTD benefits to Claimant subsequent to this date and while she worked in modified employment from February 20, 2015 through March 27, 2015 and have continued to pay her TTD benefits, Claimant's entitlement to the benefits terminated pursuant to statute on February 20, 2015.

The provisions of §8-42-105(3)(d)(I), C.R.S. would be implicated if Claimant had failed to return to work after the offer of modified employment that was made by Employer on February 19, 2015. However, as she accepted the offer and returned to

modified employment, the provisions of §8-42-105(3)(b), C.R.S. are applicable in this case. As of the date of her return to modified employment with Employer, Claimant was aware that modified employment was available, accepted the modified employment, and her entitlement to TTD benefits ceased. It is arguable that a situation may occur where, subsequent to a return to modified employment, a Claimant might receive increased work restrictions outside of their modified employment rendering them once again totally disabled. However, that did not occur in this case. Here, after Claimant returned to modified employment with Employer on February 20, 2015, she had only slight changes in her work restrictions. Claimant argues that each time a slight change in work restrictions occurs, Employer must make a new offer of modified employment to Claimant in writing. This is not found persuasive. The requirements of §8-42-105(3)(d)(I), C.R.S. to terminate TTD benefits is for someone who is temporarily totally disabled and who has been unable to work at all. This section may have applied to Claimant in early February before her return to work. However, Claimant was no longer temporarily totally disabled as of February 20, 2015 when she returned to modified employment and the provisions of §8-42-105(3)(b), C.R.S. ended her entitlement to TTD benefits. Therefore, Claimant cannot show any entitlement to TTD benefits on March 27, 2015.

Claimant's appointment with Dr. Burns on April 6, 2015 only provided one slight change to her work restrictions by requiring a 10 minute break every 2 hours to rest/elevate her leg. This one new restriction did not return Claimant to being temporarily totally disabled nor was it outside the offer of modified employment that she had accepted in February. Further, Claimant spoke with her supervisor on April 7, 2015 and he advised her that this one new restriction would be accommodated and that her modified employment continued to be available. Claimant had actual knowledge that she would continue to be accommodated in modified employment as she had been since February 20, 2015. Although §8-42-105(3)(d)(II), C.R.S. is specific to temporary help contracting firms, it is instructive on the overall intent of §8-42-105, C.R.S. It provides that "once the employee has received one written offer of modified employment…the employee shall be deemed to be on notice that modified employment is available. Subsequent offers of modified employment need not be in writing so long as the job requirements of within the restrictions given the employee by the employee's attending physician…" Here, Claimant had received and accepted a written offer of modified employment and started such modified employment on February 20, 2015. She had actual knowledge that modified employment through Employer within her restrictions was available as of that date. Her further contact with her supervisor on April 6, 2015 assured her that she would continue to be accommodated within the one slight new restriction given by her authorized treating provider.

Claimant's argument that 7 CCR 1101-3, Rule 6-1(A)(4) applies in this case is also not persuasive. That rule provides the requirements for an Insurer when an Insurer wishes to terminate TTD benefits without hearing by filing an admission of liability. Here, Insurer is not attempting to terminate TTD by filing an admission of liability. If they were, then they would have to follow the requirements of the rule, including sending a letter to Claimant certified mailed with an offer of modified employment, and a statement from an authorized treating physician that the employment offered is within

Claimant's physical restrictions. This rule outlines the requirements to terminate TTD by filing an admission of liability and is not a general requirement for any and all offers of modified employment. The modified employment offer made to Claimant on February 19, 2015 was sufficient and she accepted the offer and began modified employment on February 20, 2015 thus ending her entitlement to TTD benefits. Therefore, Claimant is unable to establish, as a threshold issue, that she was entitled to TTD benefits on March 27, 2015 or thereafter.

Responsible for Termination

Claimant contends that she is owed TTD benefits for the period of time following her March 27, 2015 termination and ongoing. Although the ALJ concludes that Claimant cannot meet the threshold requirement of showing any entitlement to TTD benefits on March 27, 2015 or thereafter, the ALJ examines in the alternative Respondent's contention that Claimant would be precluded from receiving TTD benefits because she was responsible for her termination. The ALJ concludes that even if Claimant had a valid claim for TTD benefits from March 27, 2015 and ongoing, Respondents have met their burden to establish that Claimant was responsible for the termination of her employment.

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office, supra; Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). A claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*.

Respondents have met their burden to establish that Claimant was responsible for the termination of her employment. Claimant is therefore barred from recovering TTD benefits subsequent to March 27, 2015. Claimant was not terminated in this case due to her injury. The evidence shows that Employer continued to employ Claimant after her injury and kept her off work paying her TTD benefits after her injury and during

her recovery. On February 19, 2015 Employer offered Claimant modified light duty work. Claimant accepted the modified employment and worked for Employer in modified employment from February 20, 2015 through March 27, 2015. On March 27, 2015 Claimant reported that the steel toed boots were causing her pain and that she needed to see her doctor before continuing working. Again, Employer accommodated Claimant's request and waited to see the outcome of her upcoming doctor's appointment. After her appointment on April 6, 2015 Claimant's doctor provided one additional restriction of a 10 minute break every two hours to rest/elevate her foot. The very next day, Claimant's supervisor advised her by phone that they could continue to accommodate her restrictions in her modified duty employment and that she needed to come back to work.

Claimant had actual notice during that phone conversation that she would continue to be accommodated in her modified employment. Claimant had been working in modified employment for Employer since February 20, 2015. Claimant alleges that Dr. Burns' restrictions from the April 6, 2015 appointment were much greater and required her to either be off work or to work at Pinnacle Hospice Center, but this is not credible or persuasive. Even at her April 24, 2015 appointment Claimant was not required to be completely off work or to work at Pinnacle Hospice Center. Claimant's reports are incredible. Claimant had actual knowledge that she would continue to be accommodated in her modified employment within her work restrictions, yet she failed to return to work. Claimant also failed to remain in contact with Employer or her supervisor. Claimant failed to respond to voice mail and email messages on April 14, 2015. Finally, after several weeks without contact from Claimant and without any indication from a medical provider that Claimant in fact had greater work restrictions that fell outside of the modified employment Claimant had been working within since February 20, 2015, Employer sent Claimant a letter terminating her employment.

The ALJ concludes that Claimant's termination from employment was due to her lack of contact with Employer and her failure to report to work for several weeks. These were volitional and unreasonable acts of Claimant and she was therefore responsible for her termination. Any wage loss suffered by Claimant from March 27, 2015 and ongoing was due to her volitional and unreasonable conduct and her subjective belief that she could not work in the modified employment, despite it being within her work restrictions. Therefore, although Claimant initially failed to establish an entitlement to TTD on March 27, 2015 even if she were still entitled to TTD on that date, Respondents have met their burden to show that TTD should cease as of March 27, 2015 as any wage loss subsequent to that date was due to Claimant's termination for which she was responsible.

ORDER

It is therefore ordered that:

1. Claimant is not entitled to TTD benefits from March 27, 2015 and ongoing.

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: October 2, 2015

/s/ Michelle E. Jones

_____

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding increased average weekly wage (AWW);

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits;

3. Whether Claimant proved by a preponderance of the evidence that the medical recommendations of Dr. Stull for intermittent cortisone or Visco supplementation injections were reasonably necessary medical benefits; and

4. Whether Claimant proved by a preponderance of the evidence that he entitled to an order awarding temporary total disability benefits (TTD) from March 17, 2014, until April 29, 2014, based on the increased AWW.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. Claimant sustained an admitted industrial injury to his right knee arising out of his employment with Employer on September 6, 2011.

2. Claimant underwent a first surgery on his right knee performed by Dr. Roger Greenberg on January 19, 2012.

3. Claimant was originally placed at maximum medical improvement (MMI) by authorized treating physician, Dr. David Zieg on April 5, 2012. Dr. Zieg issued a permanent impairment rating of 16% of the right lower extremity, no permanent restrictions and no maintenance benefits were suggested.

4. Claimant continued to work for Employer while reporting ongoing pain and symptoms involving his right knee.

5. On November 21, 2013, Claimant was seen for a maintenance visit by Dr. Zieg for ongoing right knee pain. Dr. Zieg opined that Claimant's condition was likely an exacerbation of underlying arthrosis associated with the industrial injury,

nothing to suggest a new injury and referred Claimant to Dr. Greenberg for evaluation/injection and a course of physical therapy.

6. On November 25, 2013, Claimant was seen for a maintenance visit by Dr. Greenberg who performed a steroid injection and prescribed an unloader brace. Dr. Greenberg recommended a Synvisc injection.

7. On January 9, 2014, Dr. Harold Hunt performed a Synvisc injection. Dr. Hunt indicated Claimant could follow up every 3-4 months for injection therapies.
8. Claimant credibly testified at hearing that the injections provided a period of improvement for his right knee pain.

9. Claimant was evaluated by Dr. Philip Stull, orthopedic surgeon, on February 19, 2014. Dr. Stull had previously performed surgery on Claimant's left knee in 2007 with a good result. Dr. Stull recommended an MRI.

10. Claimant underwent a MRI of his right knee on February 21, 2014, which revealed severe arthritis of the medial compartment of the right knee with subchondral edema and eburnation, tear of the posterior horn of the medial meniscus, and mild chondromalacia/arthritis of the patellofemoral joint and lateral compartment.

11. On March 17, 2014, Claimant underwent right knee arthroscopy with partial medial meniscectomy, extensive arthroscopic debridement of the knee and chondroplasty performed by Dr. Stull. Claimant pursued the second surgery with Dr. Stull under his private insurance.

12. On April 29, 2014, Claimant was seen for post-operative follow up by Dr. Stull. Claimant reported his knee was doing well and he was significantly improved over his pre-operative status. Claimant reported returning to work with minimal symptoms. Dr. Stull opined that Claimant was at or approaching MMI. Dr. Stull opined that maintenance care would be reasonable to include intermittent cortisone or Visco supplementation injections at a minimum. Dr. Stull recommended that Claimant would need to be seen if he had increasing pain or symptoms of his knee joint. The opinions of Dr. Stull on the issue of maintenance medical treatment are found credible and persuasive.

13. Respondents re-opened the present claim, filing a General Admission of Liability on May 15, 2014, admitting liability for benefits including, but not limited to, TTD from March 17, 2014, until April 29, 2014, at an AWW of $765.96.

14. Claimant was seen in follow up by Dr. Zieg on June 12, 2014. Claimant reported his knee felt better than it had since the injury, noting only a minor ache in the knee intermittently. Dr. Zeig placed Claimant at MMI with no additional impairment, no restrictions and no maintenance care recommended. The opinion of Dr. Zieg with regard to maintenance is found to be less credible or persuasive

than the opinion of Dr. Stull, who was the orthopedic surgeon who performed Claimant's surgery.

15. Claimant's hourly wage and resulting income from Employer at the time of his surgery had increased to $814.80 since the date of injury. Claimant's right knee condition following his second surgery improved, and continued to improve, after he returned to work. Claimant was off work from the date of surgery until he returned to full duty work and wages on April 29, 2014. Claimant credibly testified that his knee pain has gradually worsened since MMI, but he reported no intervening injury. Claimant sought treatment outside the workers' compensation system since being placed at MMI as treatment had been denied. Claimant request additional maintenance treatment under his workers' compensation claim including injections recommended by Dr. Stull.

16. Claimant's wage records introduced into evidence at hearing demonstrated Claimant was earning $814.80 per week in gross wages at the time of his subsequent period of disability on March 17, 2014, following his second surgery until his return to work on April 29, 2014. Claimant is entitled to an award of increased TTD for this period of work related disability.

CONCLUSIONS OF LAW

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

GENERAL

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

2. 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 Bodensieck v. ICAO*, 183 P.3d

684 (Colo. App. 2008); *Kroupa* v. *ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). 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). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

AWW/TTD

3. Claimant contends that he is entitled to an order awarding increased AWW. Claimant argues that Respondents admitted liability for an AWW based on the September 6, 2011, date of injury. Claimant maintains that the evidence established he had a second period of disability, from March 17, 2014, following his second surgery until his return to work on April 29, 2014, at which time his wages had increased. Claimant contends his AWW should be increased to $814.80. Respondents argue Claimant is not entitled to increased AWW and the admitted wage is correct. It is found and concluded that Claimant is entitled to increased AWW to $814.80. Furthermore, it is concluded that Claimant is entitled to TTD from March 17, 2014, following his second surgery until his return to work on April 29, 2014, based on the increased AWW of $814.80.

4. "Wages" is defined as the "money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Section 8-40-201 (19(a), C.R.S. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. Section 8-42-102(3), C.R.S.; *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo.App. 1993); see *Williams Brother, Incorporated v. Grimm,* 88 Colo. 416, 197 P.1003 (1931); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo. App. 1992). According to *Washburn v. Academy School District No.20*, W.C. No. 4-491-308 (Industrial Claim Appeals Office (ICAO), September 16, 2002), Section 8-4-102(3), C.R.S. "grants the ALJ authority to use discretion in calculating that average weekly wage when the prescribed methods will not, for any reason, fairly compute the claimant's wage."

5. Claimant's original admitted AWW of $765.96 was based on Claimant's AWW at the time of his injury in September 2011. Claimant subsequent period of admitted disability following re-opening was from March 17, 2014, to April 29, 2014, approximately 2 ½ years later. As found, Claimant's AWW from the wage records submitted supports an AWW on March 17, 2014, of $814.80. To compensate Claimant fairly for the Claimant's actual loss of income, his average weekly wage should be determined based on his earnings at the time of each period of

disablement. *Campbell v. IBM Corporation*, 867 P.2d 77, supra (citing *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991).

6. As found, Claimant established by a preponderance of the evidence that Claimant's correct AWW at the time of his subsequent disability commencing March 17, 2014, is $814.80. Claimant further proved, consistent with Respondents' July 15, 2014, Amended Final Admission of Liability, that he was disabled from his usual employment and entitled to TTD from March 17, 2014, to April 29, 2014, Respondents shall pay Claimant TTD from March 17, 2014 to April 29, 2014 at a TTD rate of $543.20, with credit for TTD benefits previously paid to Claimant for this period of disability.

MAINTENANCE MEDICAL BENEFITS/INJECTION THERAPIES AND CLINICAL FOLLOWUP

7. Claimant contends that he established by a preponderance of the evidence that he is entitled a general award of maintenance medical benefits, and that, specifically, the maintenance benefits recommended by Dr. Stull are reasonably necessary. Respondents contend that no maintenance benefits were admitted and that the record does not support such an award. As found, it is concluded that Claimant sustained his burden of proof by a preponderance of the evidence to establish that he is entitled to a general award of maintenance medical benefits and further that the recommendations for maintenance medical benefits made by Dr. Stull are reasonably necessary.

8. The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988*); Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). An award for Grover medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993). An award of Grover medical benefits should be general in nature. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003).

9. In this matter, Dr. Stull credibly testified that maintenance medical benefits in the present claim were reasonable, specifically, citing the need for injection therapies and clinical follow up at a minimum. It is noted that Dr. Stull is an orthopedic specialist, who performed Claimant's successful second surgery. It is also noted

that Claimant underwent prior injections as maintenance medical care with reported improvement. Also, another orthopedic specialist, Dr. Hunt, also recommended further injection therapies every 3-4 months. Claimant established by a preponderance of the evidence that he is entitled to an order awarding maintenance medical benefits, including, but not limited to the recommendations of Dr. Stull, which were shown to be reasonable and necessary medical benefits to prevent deterioration of his condition.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant's AWW as of March 17, 2014, is $814.80, with a corresponding TTD rate of $543.20.

2. Respondents shall pay Claimant the previously admitted TTD benefits from March 17, 2014, until April 29, 2014 at a TTD rate of $543.20 with a credit for actual TTD benefits previously paid by Respondents to Claimant for this period.

3. Claimant's request for a general maintenance award is granted.

4. The maintenance treatment recommendations by Dr. Stull are found reasonable and necessary.

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: _10/27/15____

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

1. Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment in the form of Botox injections is causally related, reasonable and necessary to relieve the effects of her April 12, 2004 admitted industrial injuries or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-10 (F) for unreasonable delay or denial of prior authorization.

FINDINGS OF FACT

1. Claimant is a 58 year old female who worked for Employer as an Insurance Litigation Consultant. On April 12, 2004 Claimant reported bilateral hand pain that she attributed to typing, telephone use, mail processing, punching holes in paper and filing while at work. She was initially diagnosed with bilateral Carpal Tunnel Syndrome (CTS) based on the repetitive use of her upper extremities while working for Employer.

2. On April 15, 2007 Claimant reached Maximum Medical Improvement (MMI). On August 29, 2007 Claimant underwent a Division Independent Medical Examination (DIME) with Justin D. Green, M.D. He agreed that Claimant had reached MMI on April 15, 2007. Dr. Green diagnosed Claimant with bilateral CTS, myofascial neck pain and a history of carpal-metacarpal arthropathy. He also noted that Claimant had undergone multiple carpal tunnel releases and left ulnar release surgery. Dr. Green assigned a 31% whole person impairment rating.

3. On October 1, 2007 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Green's determinations. Respondents agreed to provide Claimant with authorized, reasonable and necessary medical maintenance benefits related to her industrial injuries.

4. On April 3, 2008 the parties executed a partial settlement agreement to resolve outstanding issues regarding indemnity benefits. The parties specifically stipulated that Respondents only retained an obligation to pay for "all authorized, reasonable/necessary medical care causally related to the industrial injury."

5. On December 13, 2007 Bennett Machanic, M.D. performed an EMG/NCV on Claimant. The study revealed findings consistent with bilateral chronic CTS, lower brachial plexus pathology on the left and thoracic outlet syndrome on the right.

6. On December 21, 2007 Yechiel Kleen, M.D. initiated treatment for Claimant's chronic pain. He subsequently administered a number of trigger point injections.

7. In June 2011 Dr. Kleen transferred Claimant's medical care to Bradley Vilims, M.D. Dr. Vilims provided a series of trigger point injections for Claimant's chronic pain. By November 26, 2013 he began administering Botox injections.

8. On December 2, 2014 Claimant underwent her fourth EMG study. The second and third EMG studies had revealed "worsening of distal median neuropathic dysfunction" bilaterally. The December 2, 2014 study reflected widespread axonal dysfunction on all nerves tested. Dr. Machanic noted that the new EMG findings raised "a question as to whether [Claimant] has developed a medical problem superimposed on the pre-existing issues, thus "mak[ing] everything worse." He explained that the new axonal problems constituted a "complex new disease process superimposed upon the old, and she may very well have a peripheral neuropathy due to metabolic processes, such as diabetes or vitamin deficiencies."

9. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections by faxing a request to Respondents. He sought to administer the injections to Claimant every three to four months.

10. Respondents forwarded Dr. Vilims' request to Henry Roth, M.D. for review. On February 6, 2015 Dr. Roth determined that the request should be denied for medical reasons. Dr. Roth specifically noted that the proposed treatment was not directed at treating conditions consistent with Claimant's admitted industrial injuries. Instead, the injections were focused on treating Claimant's idiopathic conditions including axonal dysfunction.

11. On February 12, 2015 Respondents sent a letter to Dr. Vilims denying his request for prior authorization and attached Dr. Roth's report. Respondents denied the request for medical and non-medical reasons under W.C.R.P. 16-10(A) and (B). Respondents noted that the requested services "may not be related to the admitted injury." The denial letter included a certification that the letter was sent to Dr. Vilims, Claimant and Claimant's counsel.

12. In addition to providing a denial letter Respondents also filed an Application for Hearing on February 12, 2015. Respondents endorsed the denial of Dr. Vilims' request for Botox injections and the reasonableness, necessity and relatedness of continuing medical benefits. Filing the Application for Hearing constituted a second action to contest a request for prior authorization pursuant to Rule 16-10(E)(1)-(2).

13. On April 20, 2015 Neil Pitzer, M.D. conducted a records review of Claimant's claim. He noted that Claimant had been diagnosed with CTS and undergone carpal tunnel releases that provided temporary benefit. However, Claimant subsequently underwent multiple nerve releases that were not related to her CTS and did not provide significant improvement. Dr. Pitzer recounted that Claimant has received trigger point and Botox injections without improvement or documented changes in function. He remarked that Claimant has not worked since 2004 and has not been exposed to any work activities over the previous 10 years. Dr. Pitzer determined that there was no clinical reason for "continued Botox injections or other physical therapy for her myofascial symptoms as these have not improved and are likely related to her underlying rheumatologic condition and not to her work exposure."

14. Claimant testified at the hearing in the present matter. She explained that the Botox injections provide functional improvement. Claimant noted that within one to two weeks of the injections her pain symptoms decrease and her muscles relax. She can then perform activities without pain.

15. On August 31, 2015 Dr. Machanic testified through an evidentiary deposition in this matter. Dr. Machanic explained that Botox is an appropriate treatment for Claimant's thoracic outlet conditions and pain in the major and minor pectoralis muscles. He stated "[w]ell, it's one of many treatments and it's appropriate." Dr. Machanic remarked that Botox is reasonable and necessary to relieve the symptoms of Claimant's condition. He summarized that Dr. Vilims should be permitted to treat Claimant because the interventions "have provided increased stability for [Claimant] to function. In other words, it's helped symptoms and its helped activities of daily living and quality of life."

16. On June 22, 2015 the parties conducted the evidentiary deposition of Henry Roth, M.D. Dr. Roth explained that the proposed Botox injections were not related to Claimant's April 12, 2004 industrial injuries but were instead designed to treat her non-work-related conditions. He explained:

> Where we find ourselves now is the request for Botox injections to relieve discomfort that she has in her neck and upper back, as well as the consideration of more treatment she has in her upper extremities. All of these things are explained by her personal medical disorders, the inflammatory disease that she had, the very potent medications that she takes. None of these things, and certainly not an axonal neuropathy, are explained by mechanical exposures that are at this point incredibly removed from the onset.

He further testified that the Botox injections were aimed at conditions that were not related to Claimant's work activities.

17. Dr. Roth testified that none of Claimant's current medical treatment, including pool therapy, medications, Botox injections and massage therapy, was "with any probability related to the notion of a cumulative trauma disorder 11 years ago." He

maintained that the current treatment was aimed at conditions in the neck, shoulders, and upper back and could not have been caused by the admitted CTS problems in the bilateral wrists.

18. Dr. Roth further explained that when providing treatment for Claimant's condition of rheumatoid or psoriatic arthritis

> it is ordinary to see chronic diffuse bilateral symmetrical myofascial disorders. That's what she's presenting with. That's what the doctors are trying to treat. Whether it's called myogenic thoracic outlet or myofascial pain or fibromyalgia, that is common, ordinary, and part and parcel of these rheumatoid diseases. It is not part of carpal tunnel syndrome.

Dr. Roth summarized that "the treatments that [Claimant] is pursuing are a reflection of the idiopathic medical conditions, not mechanically sustained work-related disorders."

19. On June 23, 2015 the parties conducted the evidentiary deposition of Dr. Pitzer. He maintained that the requested Botox injections were not related to her work exposure but were instead directed to her underlying rheumatologic condition. Dr. Pitzer commented that Claimant has received multiple Botox injections but has not received long-term improvement.

20. Dr. Pitzer also explained that the proposed Botox injections did not constitute reasonable and necessary medical treatment for Claimant's condition. He recounted that in December 2013 Claimant reported immediate relief after receiving a Botox injection. However, Dr. Pitzer noted that Botox injections do not provide immediate relief because they do not involve the administration of a local anesthetic. Instead, Botox injections take up to one week to provide noticeable relief. Therefore, Claimant's immediate relief constituted a non-physiologic response that did not support continued injections.

21. Dr. Pitzer testified that there is long-term toxicity associated with Botox injections and the muscles become weaker with repetitive injections. The toxicity would not help Claimant's arthritic or muscle pain conditions. Dr. Pitzer summarized that Botox constituted an "invasive potentially toxic treatment" that should not be continued unless there are well-documented functional gains.

22. Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of Botox injections is causally related, reasonable and necessary to relieve the effects of her April 12, 2004 admitted industrial injury or prevent further deterioration of her condition. On April 12, 2004 Claimant sustained admitted industrial injuries including bilateral CTS, myofascial neck pain and a history of carpal-metacarpal arthropathy. On October 1, 2007 Respondents filed a FAL and agreed to provide Claimant with authorized, reasonable and necessary medical maintenance benefits related to her industrial injuries. Claimant subsequently received a variety of medical maintenance benefits including Botox injections. On February 3, 2015 Dr. Vilims requested prior authorization for Botox

injections to be administered every three to four months. Dr. Pitzer and Dr. Roth persuasively explained that the requested Botox injections were not related to Claimant's industrial injuries but were instead designed to treat her underlying rheumatologic condition. Claimant suffers from widespread axonal dysfunction of her nerves that was not caused by the April 12, 2004 work exposure. Moreover, Claimant has received trigger point and Botox injections without improvement or documented changes in function. Dr. Pitzer also explained that the proposed Botox injections do not constitute reasonable and necessary medical treatment for Claimant's condition. Finally, he testified that there is long-term toxicity associated with Botox injections and the muscles become weaker with repetitive injections.

23. In contrast, Dr. Machanic remarked that Botox is reasonable and necessary to relieve the symptoms of Claimant's condition. He summarized that Dr. Vilims should be permitted to treat Claimant because his interventions have reduced symptoms and improved Claimant's function. However, the medical records, in conjunction with the persuasive testimony of Drs. Roth and Pitzer reveal that the proposed Botox injections are not related to Claimant's April 12, 2004 industrial injuries but were instead designed to treat her underlying rheumatologic condition. Accordingly, Dr. Vilims' February 3, 2015 request for Botox injections is denied and dismissed.

24. Claimant has failed to demonstrate that it is more probably true than not that she is entitled to penalties pursuant to §8-43-304(1), C.R.S. for the violation of W.C.R.P. 16-10(F) for unreasonable delay or denial of prior authorization. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections to be administered every three to four months. Respondents submitted the request to Dr. Roth for review and on February 6, 2015 he concluded that the request should be denied for medical reasons. He specifically explained that the proposed treatment was not directed at treating conditions consistent with Claimant's admitted industrial injuries. Instead, the injections were focused on treating Claimant's idiopathic conditions including axonal dysfunction. On February 12, 2015 Respondents sent a letter to Dr. Vilims denying his request for prior authorization and attached Dr. Roth's report. Respondents denied the request for medical and non-medical reasons under W.C.R.P. 16-10(A) and (B). Based on the persuasive report of Dr. Roth, Respondents had a good faith basis for the denial of Dr. Vilims' request. Furthermore, Respondents filed an Application for Hearing on February 12, 2015. Respondents endorsed the denial of Dr. Vilims' request for Botox injections and the reasonableness, necessity and relatedness on continuing medical benefits. Filing the Application for Hearing constituted a second action to contest a request for prior authorization pursuant to Rule 16-10(E)(1)-(2). Respondents complied with Rule 16 and had a good faith basis for denying Claimant's prior authorization request for Botox injections. Accordingly, Claimant has failed to demonstrate that Respondents' denial of the prior authorization request was unreasonable.

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).

Medical Maintenance Benefits

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of Botox injections is causally related, reasonable and necessary to relieve the effects of her April 12, 2004 admitted industrial injury or prevent further deterioration of her condition. On April 12, 2004 Claimant sustained admitted industrial injuries including bilateral CTS, myofascial neck pain and a history of carpal-metacarpal arthropathy. On October 1, 2007 Respondents filed a FAL and agreed to provide Claimant with authorized, reasonable and necessary medical maintenance benefits related to her industrial injuries. Claimant subsequently received a variety of medical maintenance benefits including Botox

injections. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections to be administered every three to four months. Dr. Pitzer and Dr. Roth persuasively explained that the requested Botox injections were not related to Claimant's industrial injuries but were instead designed to treat her underlying rheumatologic condition. Claimant suffers from widespread axonal dysfunction of her nerves that was not caused by the April 12, 2004 work exposure. Moreover, Claimant has received trigger point and Botox injections without improvement or documented changes in function. Dr. Pitzer also explained that the proposed Botox injections do not constitute reasonable and necessary medical treatment for Claimant's condition. Finally, he testified that there is long-term toxicity associated with Botox injections and the muscles become weaker with repetitive injections.

6. As found, in contrast, Dr. Machanic remarked that Botox is reasonable and necessary to relieve the symptoms of Claimant's condition. He summarized that Dr. Vilims should be permitted to treat Claimant because his interventions have reduced symptoms and improved Claimant's function. However, the medical records, in conjunction with the persuasive testimony of Drs. Roth and Pitzer reveal that the proposed Botox injections are not related to Claimant's April 12, 2004 industrial injuries but were instead designed to treat her underlying rheumatologic condition. Accordingly, Dr. Vilims' February 3, 2015 request for Botox injections is denied and dismissed.

Penalties

7. A party may be penalized under §8-43-304(1), C.R.S. for up to $1,000 day for any failure, neglect or refusal to obey and lawful order made by the director or panel. *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. Ct. App. 2003). The moving party for a penalty bears the burden of proving that a party failed to take an action that a reasonable party would have taken. *City of County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-65 (Colo. Ct. App. 2002). Once the prima facie showing of unreasonableness has been made, the burden of persuasion shifts to the party who committed the alleged penalty to show that the conduct was reasonable under the circumstances. *See e.g. Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Postlewait v. Midwest Barricade*, 905 P.2d 21, 23 (Colo. App. 1995).

8. Claimant claims that penalties should be assessed against Respondents pursuant to §8-43-304(1), C.R.S. and W.C.R.P. 16-10(F) for unreasonable delay or denial of prior authorization. She asserts that Respondents' acted unreasonably in denying Dr. Vilims' prior authorization request for Botox injections.

9. Rule 16-10 contains two separate penalty provisions. Under paragraph (E), the penalty is that the requested treatment shall be deemed authorized. However, the penalty can be avoided if: (1) a hearing is requested within seven business days from the request; and (2) the provider is notified that the request is being contested and the matter is going to hearing. Paragraph (F) contains a completely separate penalty

provision. Under this paragraph, the ALJ may assess penalties under the general penalty statute for unreasonable delays or the denial of prior authorization.

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to penalties pursuant to §8-43-304(1), C.R.S. for the violation of W.C.R.P. 16-10(F) for unreasonable delay or denial of prior authorization. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections to be administered every three to four months. Respondents submitted the request to Dr. Roth for review and on February 6, 2015 he concluded that the request should be denied for medical reasons. He specifically explained that the proposed treatment was not directed at treating conditions consistent with Claimant's admitted industrial injuries. Instead, the injections were focused on treating Claimant's idiopathic conditions including axonal dysfunction. On February 12, 2015 Respondents sent a letter to Dr. Vilims denying his request for prior authorization and attached Dr. Roth's report. Respondents denied the request for medical and non-medical reasons under W.C.R.P. 16-10(A) and (B). Based on the persuasive report of Dr. Roth, Respondents had a good faith basis for the denial of Dr. Vilims' request. Furthermore, Respondents filed an Application for Hearing on February 12, 2015. Respondents endorsed the denial of Dr. Vilims' request for Botox injections and the reasonableness, necessity and relatedness on continuing medical benefits. Filing the Application for Hearing constituted a second action to contest a request for prior authorization pursuant to Rule 16-10(E)(1)-(2). Respondents complied with Rule 16 and had a good faith basis for denying Claimant's prior authorization request for Botox injections. Accordingly, Claimant has failed to demonstrate that Respondents' denial of the prior authorization request was unreasonable.

ORDER

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

1. Claimant's request for medical maintenance benefits in the form of Botox injections is denied and dismissed.

2. Claimant's request for penalties 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: October 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-657-243-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on July 30, 2015 and September 21, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 7/30/15, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM; and, 9/21/15, Courtroom 3, beginning at 1:30 PM, and ending at 3:10 PM).

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. Respondents' Exhibits A through S were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed on September 28, 2015. On September 30, 2015, the Respondents filed detailed objections and a proposed counter decision, which argues the Respondents' spin on the evidence and seeks a re-weighing of the evidence. While such an approach may be appropriate for an appellate brief, it is not a proper approach to objections as to form. On October 1, 2015, the Claimant, through counsel, filed her disagreement with the Respondents' objections. After a consideration of the proposed decision and the objections thereto (most of which are rejected), the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the recommendation of the Claimants authorized treating physician (ATP), Christopher B. Ryan, M.D., for a motorized scooter and whether the motorized scooter is reasonably necessary to cure and relieve the effects of the admitted right ankle injury of July 13, 2005.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

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

1. The Claimant sustained an admitted injury to her right foot and ankle in the course and scope of her employment with the Respondents on July 13, 2005. The Claimant testified, and the ALJ finds that she has undergone extensive treatment, including 8 surgeries on her foot, until being placed at maximum medical improvement (MMI) by Dr. Ryan and Steven Dworetsky, M.D., in 2014.

2. The Claimant experiences severe pain in her foot regularly. Dr. Dworetsky has diagnosed her with severe depression due to the pain she has experienced. (Claimant's Exhibit 2, Bates 0024). The pain is well documented by Dr. Ryan who has been her ATP. The ALJ infers and finds that the Claimant's depression is highly relevant to the pain she experiences from the admitted ankle injury with almost ten years of sequelae.

3. The Claimant has good days and bad days. She stated that she is able to walk around for short distances on her foot. She said that she uses a walker for support if she is going for a longer distance. She has difficulty walking around the house and falls. She reports that she has considerable pain in the foot all the time.

4. Dr. Ryan states in his report of February 25, 2015 that he is trying to taper the Claimant's medication but that it is difficult to do so given her report of no difference in her pain level.

5. In his report of September 3, 2014. Dr. Ryan recommended that the Claimant have mobility assistance. He reports that she simply finds it too painful to walk on the foot. He states, " I believe that she most likely will benefit from an electric scooter or some other mobility assist, so that she can get out. This will allow her more functionality, and will have a significant psychological benefit."(Claimant's Exhibit 1, Bates 0011).

6. The Respondents admitted liability for almost nine years of temporary total disability (from July 14, 2005 through May 15, 2014), which is inconsistent with the Respondents' argument minimizing the Claimant's physical condition, and the Respondents' thrust arguing for an apparent "life hardening" program involving the use of a walker and cane and weaning the Claimant off of these assistive devices.

Steven Dworetsky, M.D., Psychiatrist

7. Dr. Dworetsky, a psychiatrist, examined the Claimant on October 12, 2014. He noted that at the time of the admitted injury, the Claimant was a door-to-door salesperson, who tripped, fell onto the ground and sustained a severe injury to her right ankle. She was unable to get up. She was initially diagnosed with an ankle sprain but eventually a bone chip was noticed. Thereafter, problems ensued with bone healing, scar tissue and severe pain. There were at least 6 additional surgeries and the Claimant ended up with an ankle fusion. Her condition led to Dr. Dworetsky diagnosing a "major depressive disorder secondary to her work injury." The Claimant had no previous psychiatric treatment.

The Videotape of the Claimant in Dardano's Shoe Store

8. The film depicts the Claimant standing while leaning on a counter and walking some –all in the span of 20-minutes—in a smaller store that does not compare to a supermarket. The videotape is consistent with the Claimant's testimony that she has good days and bad days, and that she is able to do a little un-assisted walking.

9. In an apparent effort to imply that the Claimant wanted "to take the Respondents for a ride," the Respondents offered a Dardano's printout of an estimate for orthopedic shoes, totaling $1,159.03 (Respondents' Exhibit R, admitted without objection). Respondents argued that the estimate was inconsistent with Dr. Ryan's prescription for orthopedic shoes 9respndents' Exhibit S). The ALJ infers and finds that these pieces of evidence are of borderline relevance t5o the central issues in this case. Indeed, they are of peripheral relevance to collateral credibility issues.

Independent Medical Examination (IME) by L. Barton Goldman, M.D.

10. The Respondents referred the Claimant to Dr. Goldman for an IME. Dr. Goldman was of the opinion that the Claimant needed to be weaned off her medications and not use anything other than her walker for mobility. In his testimony at the first hearing held in July 30, 2015, Dr. Goldman stated the opinion that the Claimant needed to try to work toward not using assistive devices. The ALJ specifically finds that the Claimant has had eight surgeries and has had many years to attempt to walk on her injured foot without assistive devices-- without success. Dr. Ryan's opinion on this issue is more persuasive than Dr. Goldman's opinion.

11. Dr. Ryan's report of March 15, 2015 discusses his difference of opinion with Dr. Goldman. It relates the difficult time the Claimant has had with mobility and her depression related to her inability to get out of the house due to pain. Dr. Ryan states that he does not believe that they will be able to taper, much less discontinue her medications without some mobility assistance. The Claimant's use of the mobility assistance, here a scooter, will have a therapeutic benefit that relieves the effects of the injury. Indeed, the ALJ finds that it will help restore the Claimant's pre-injury quality of life, thus, preventing a deterioration of her condition and maintaining her stabilized plateau of MMI.

Ultimate Findings

12. Despite the Respondents' efforts to impeach the Claimant with collateral matters allegedly leading to inferences that the Clamant is not credible, the ALJ finds the Claimant's overall testimony concerning her need for a motorized scooter to be credible.

13. The ALJ finds the opinions of Dr. Ryan more credible than the opinions of Dr. Goldman because Dr. Ryan's opinions are based on a lengthier course of treatment as an ATP and Dr. Goldman was a "one-shot" IME.

14. Between conflicting medical opinions, the ALJ makes a rational choice to accept Dr. Ryan's opinions for the reasons stated herein above, and to reject Dr. Goldman's opinions.

15. A motorized scooter is a legitimate medical apparatus, contemplated as a medical benefit under the Worker's Compensation Act.

16. The Claimant has proven, by a preponderance of the evidence that her ATP's prescription for a motorized scooter is causally related to the admitted injury of July 13, 2005, and it is reasonably necessary to maintain the Claimant at MMI and to prevent deterioration of her condition.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684

(Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, despite the Respondents' efforts to impeach the Claimant with collateral matters allegedly leading to inferences that the Clamant is not credible, the ALJ finds the Claimant's overall testimony concerning her need for a motorized scooter to be credible. Also, as found, the opinions of Dr. Ryan were more credible than the opinions of Dr. Goldman because Dr. Ryan's opinions are based on a lengthier course of treatment as an ATP and Dr. Goldman was a "one-shot" IME.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a

particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept Dr. Ryan's opinions and to reject Dr. Goldman's opinions.

Medical Benefits –Motorized Scooter

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's need for a motorized scooter is causally related medical treatment. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's need for a motorized scooter is a reasonably necessary, medical apparatus to maintain her at MMI and to prevent a deterioration of her work-related condition.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. In addition to all other medical benefits admitted and paid, the Respondents shall pay the costs of a motorized scooter, as prescribed by the Claimant's ATP, Dr. Ryan, as a post maximum medical improvement maintenance benefit, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

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

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

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-679-322-05

ISSUES

The sole issue determined herein is whether summary judgment[1] is proper on Claimant's Application for Hearing on the petition to reopen.

PROCEDURAL STATUS

The Findings of Fact, Conclusions of Law and Order granting Respondents' Motion for Summary Judgment was issued on October 5, 2015. The remained pending a hearing scheduled for October 16, 2015 in Greeley, Colorado on Claimant's Petition to Reopen and request for additional permanent partial disability benefits. The parties participated in a status conference on October 14, 2015 before the undersigned ALJ, at which time an oral motion for an amendment of the findings of fact, conclusions of law and order was made. That motion was granted and the instant Amended Findings of Fact, Conclusions of Law and Order resolves the remaining issues set for determination at hearing.

UNDISPUTED FACTS

1. Claimant sustained an admitted back injury on April 8, 2005. On July 7, 2006, Respondents filed a Final Admission of Liability (FAL) admitting for permanent partial disability (PPD) benefits based upon the 5% whole person impairment rating issued by the Division independent medical examination (DIME) physician, John Aschberger, M.D. The FAL denied liability for post-maximum medical improvement (MMI) medical benefits.

2. On December 7, 2007, the parties entered into a written Stipulation Regarding Reopening and a follow-up DIME. The stipulation specified Claimant had filed a petition to reopen in August 2007. The stipulation provided that the "parties have agreed this claim was reopened on March 26, 2007", and that the Claimant was back at MMI with no additional impairment as of May 21, 2007. The stipulation also provided Claimant would undergo another DIME with Dr. Aschberger within 30 days of the date the stipulation was approved. ALJ Harr approved the stipulation by Order dated December 7, 2007.

3. Dr. Aschberger conducted a second DIME on January 30, 2008. In a report issued on February 11, 2008, Dr. Aschberger opined that Claimant was at MMI on February 28, 2006 with no additional impairment.

[1] Even though the instant motion is denominated "Motion for Summary Judgment", it is more properly construed as a Motion for Partial Summary Judgment, as it does not dispose of all issues in the case and the claim remains open for maintenance medical benefits.

4. On March 27, 2008, Respondents filed an amended FAL pursuant to Dr. Aschberger's February 11, 2008 report. The FAL did not admit for additional PPD benefits. The FAL also denied liability for post-MMI medical benefits. There was no record that Claimant filed an objection to the FAL.

5. On March 28, 2011, Claimant's counsel filed a petition to reopen the claim. This petition alleged a "change in medical condition." On July 25, 2011, Claimant's counsel filed an Application for Hearing and Notice to Set, which listed as the issue for determination: petition to reopen the claim.

6. On December 22, 2011, Claimant's counsel and Respondents' counsel entered into a signed "Stipulation". Paragraph 1 of the stipulation stated that Claimant filed a petition to reopen the claim for the April 8, 2005 injury, as well as a new claim that listed the date of injury as July 27, 2010. The stipulation stated these claims had been consolidated for purposes of a hearing and the issues involved "compensability, causality, and relatedness." Paragraph 2 of the stipulation stated that Claimant filed a timely petition to reopen the 2005 claim and that the parties "stipulate and agree that Claimant will continue to receive reasonable, necessary and related medical care to maintain maximum medical improvement for the 2005 claim by way of authorized treating physician, Dr. Cathy Smith". Paragraph 3 of the stipulation specified the parties stipulated and agreed the evidence does not support a "new injury to the lumbar spine on July 27, 2010" and the Claimant agreed to withdraw the claim for that alleged injury. The stipulation provided that the claim for a July 2010 injury shall only be reopened for fraud or mutual mistake of material fact. Finally, paragraph 3 stated that: "All other issues are hereby reserved."

7. On January 5, 2012, PALJ Purdie signed an "Order Granting Stipulation." That Order incorporated the language concerning *Grover* medical benefits, which would be provided by Dr. Smith and the withdrawal of the July 2010 claim.

8. On July 23, 2012, Claimant filed an Application For Hearing And Notice To Set in the claim for the April 8, 2005 injury. The only issue listed was permanent partial disability benefits. Respondents filed a Response listing issues of jurisdiction, ripeness, whether "PPD is closed and whether Claimant has to establish a right to reopen before the court can address PPD."

9. On December 7, 2012, ALJ Broniak conducted a hearing concerning the Claimant's July 2012 application. On February 8, 2013 ALJ Broniak entered Findings of Fact, Conclusions of Law, and Order (FFCL). The FFCL stated the issue for determination is "whether the Claimant is entitled to an increased permanent impairment rating." However, ALJ Broniak concluded she lacked "authority" to resolve this issue because Claimant had not obtained a DIME to challenge the ATP's rating as required by § 8-42-107(8)(c), C.R.S. and § 8-42-107.2, C.R.S.

10. On April 16, 2013, the Claimant's counsel filed an Application for a Division Independent Medical Examination. The body parts listed for examination were

low back and any other area deemed related by the examiner. A DIME was scheduled for July 2, 2013.

11. On June 6, 2013, Respondents' counsel filed Respondents' Motion to Strike Claimant's Application for a Division IME. This Motion took the position that the claim was closed pursuant to the March 27, 2008 FAL and had never been reopened.

12. Claimant filed an objection to the Respondents' Motion to Strike the DIME application. Citing ALJ Broniak's FFCL, Claimant argued that the claim had in fact been reopened.

13. PALJ Purdie granted Respondents' Motion to Strike on June 25, 2013, stating that there had been no Response to the Motion. Claimant filed a Motion to Reconsider this ruling since he had in fact filed a response.

14. Dr. Shea performed the DIME on July 2, 2013 despite the fact that PALJ had granted Respondents' Motion to Strike. Dr. Shea opined the Claimant reached MMI on February 28, 2006 and that he sustained a 19% whole person impairment rating.

15. On July 10, 2013, PALJ Purdie denied Claimant's Motion to Reconsider her June 25, 2012 Order. PALJ Purdie wrote the following: "Paragraph 2 of the parties' December 22, 2011 Stipulation affirms that Claimant was at MMI as of that date (or earlier) and was receiving maintenance benefits. Claimant abandoned the petition to reopen by canceling the hearing. The claim remains closed except for maintenance medical benefits."

16. On August 7, 2013, Respondents filed an Application for Hearing and Notice to Set endorsing the issues of PPD, penalties for failure to comply with ALJ Purdie's June 25, 2012 and July 10, 2012 orders, petition to reopen if necessary, and if necessary the Respondents' motion to overcome the opinion of the "Division evaluator." Claimant filed a response to the application endorsing the issues of PPD, issue preclusion and appeal of PALJ Purdie's order of July 10, 2013.

17. After a prehearing conference, Judge Goldstein issued an order on October 24, 2013 concluding that the issues of PPD and penalties "should be bifurcated from issues set to be determined at the hearing scheduled to commence on November 8, 2013." Judge Goldstein concluded that it would be a waste of judicial and party resources to address these issues while there are "genuine issues of law and fact" concerning (1) whether the December 22, 2011 stipulation of the parties included an agreement to reopen the claim, (2) whether ALJ Brondiak's [sic] order confirmed that the matter was reopened, as opposed to only ruling that a DIME would be jurisdictionally required 'if' the matter had been reopened, (3) whether, if the claim was reopened, Respondents had a duty to file a final admission of liability or notice and proposal within thirty (30) days of Dr. Smith's November 12, 2012 report; whether, if they had that duty, they should now be compelled to file a final admission of liability; and

whether, in the absence of the FAL, Claimant is jurisdictionally barred from pursuing the DIME."

18. The case was submitted to ALJ Cain on stipulated facts and position statements. On December 12, 2013, ALJ Cain entered Findings of Fact, Conclusions of Law, and Order (FFCL)[2] and concluded that the December 22, 2011 stipulation was ambiguous as to whether the parties agreed to reopen the claim and did not unequivocally establish that they intended to do so. ALJ Cain concluded that the claim for benefits in WC 4-679-322-03 was not reopened by the stipulation of the parties dated December 22, 2011; that the Order of ALJ Broniak dated February 8, 2013 did not determine that the claim was reopened; and that the claim for the April 2005 injury remained closed pursuant to the Final Admission of Liability filed on March 27, 2008.

19. Claimant filed an Application for Hearing and Notice to Set on April 23, 2015, listing as the issues to be determined: medical benefits, petition to re-open claim, permanent partial benefits and *Grover* medicals. Respondents filed a Response to Application for Hearing, listing statute of limitations, waiver, estoppel and *res judicata* as the issues to be determined. The Response also specified "case is closed; a petition to reopen is necessary and whether the issues endorsed by Claimant are ripe for adjudication".

20. The ALJ finds that it has been seven (7) years and one month since the last indemnity payment.

21. The ALJ concludes that the FFCL issued by ALJ Cain determined the issue of reopening and the claim remains closed pursuant to the FAL issued on March 27, 2008. The ALJ also determines that when ALJ Cain made this decision both Claimant and Respondents were represented at the hearing and presented evidence on the March 28, 2011 petition to reopen and December 22, 2011 stipulation.

22. The ALJ finds that Claimant is not entitled to additional permanent partial disability benefits since his petition to reopen it has been denied.

23. The ALJ concludes that Claimant continues to have a right to receive *Grover* medical benefits, provided by Dr. Smith.

CONCLUSIONS OF LAW

Respondent seeks summary judgment dismissing Claimant's claim for reopening. OACRP 17 permits summary judgment when there are no disputed issues of material fact. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231, 232 (Colo. App. 2007). Colorado courts have held that C.R.C.P. 56 also applies in workers' compensation proceedings. *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d 848

[2] The undersigned ALJ took administrative notice of the Findings of Fact, Conclusions of Law and Order issued by ALJ Cain, as well as the orders issued by and PALJ Purdie and Goldstein. The Findings of Fact, Conclusions of Law and Order issued by ALJ Broniak was included in Respondents' Motion for Summary Judgment.

(Colo. App. 1995); *Nova v. Industrial Claims Appeals Office*, 75 P.2d 800 (Colo. App. 1988) [the Colorado Rules of Civil Procedure apply insofar as these are not inconsistent with the procedural or statutory provisions of the Act]. Summary judgment is a drastic remedy and is appropriate only if the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999).

All doubts as to the existence of disputed facts must be resolved against the moving party and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp,* 741 P.2d 714 (Colo. App. 1987). Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

In the instant Motion for Summary Judgment, Respondents contended that there was no disputed issue of material fact with regard to Claimant's petition to reopen. Respondents asserted that 8-40-301, C.R.S. bars reopening and as part of their proof, submitted the Affidavit of Jacob Brejcha (claims adjuster) which confirmed that no indemnity benefits had been paid for more than seven years. Respondents also relied upon the previous rulings in the case, particularly the FFCL issued by ALJ Broniak to support their contention that there was no disputed issue of material fact.

In his objection, Claimant argued that the petition to reopen filed on March 28, 2011 was timely and the claim has remained open since that time. Claimant asserted that no hearing or order has resolved the petition to reopen and there was no determination whether Claimant's condition has worsened. The ALJ has considered these arguments, the extensive procedural history in the case (including multiple orders which have been issued) and determined summary judgment is properly granted for three reasons. First, based upon previous orders issued in the case, including the FFCL issued by ALJ Cain (December 12, 2013) the claim remains closed. The FFCL dated December 12, 2013 contained an extensive recitation of the procedural history of the case, including all orders issued by both ALJ's and PALJ in the case. None of those orders are in dispute and leads to the conclusion that the case remained closed as of December 12, 2013.

More importantly, it was incumbent on Claimant to present evidence which would create a triable issue of material fact. *Gifford v. City of Colorado Springs*, *supra*, 815 P.2d at 1011. Claimant's Objection to the Motion for Summary Judgment needed to create a triable issue of material fact. More particularly, ALJ Cain concluded that the parties' stipulation, dated December 22, 2011, did not reopen the April 8, 2005 injury. In his decision, ALJ Cain considered and rejected the argument that the claim was reopened by virtue of the stipulation. Claimant's objection does not create a triable issue in this case.

Implicit in the FFCL issued by ALJ Cain was the conclusion that the claim was not reopened by virtue of the March 28, 2011 petition to reopen. ALJ Cain noted that the March 28, 2011 petition to reopen was filed, but did not deem that to be conclusive and he decided that the claim remained closed. Claimant's primary argument in response to the instant motion was that the claim remained open by virtue of the March, 2011 petition to reopen. However, this is simply not supported by a review of ALJ Cain's decision. Had ALJ Cain determined that the March 28, 2011 petition to reopen actually reopened the claim, his FFCL would have stated as much. Claimant has not presented any evidence to support the allegation that the claim was actually reopened and therefore, this claim remains closed as of the FAL in 2008. As such, summary judgment is properly granted in favor of Respondents.

Second, the FFCL issued by ALJ Cain constitutes the law of the case. Under this doctrine, a court will generally adhere to a prior ruling on a question of law that it made at an earlier stage of the same litigation. *Giampapa v. Am. Family Mut. Ins. Co.,* 64 P.3d 230, 243 (Colo. 2003). There is discretion to deviate from this law of the case principle, if the court determines that the prior ruling at issue was no longer sound because of changed conditions, factual errors, intervening changes in the law or resulting manifest injustice. *Id; People of the City of Aurora, ex rel. State v. Allen, 885 P.2d 207, 212 (Colo. 1994).* Considered as a question of law, the undisputed facts establish that ALJ Cain held that the claim was not reopened by the stipulation entered into the parties. ALJ Cain concluded as a matter of law that Claimant's case was not reopened by virtue of the stipulation of the parties. This conclusion is buttressed by the fact that Claimant has not received indemnity benefits for more than seven years. Accordingly, this claim remains closed and under the law of the case doctrine, there is no reason to disturb this prior ruling. As such, reopening is barred.

Third, the doctrine of issue preclusion bars relitigation of Claimant's petition to reopen. Although the principles of issue or claim preclusion[3] were developed in the context of judicial proceedings, these doctrines are applicable in workers' compensation matters. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44,47 (Colo. 2001); *Feeley v. Industrial Claim Appeals Office*,195 P. 3d 1154 (Colo. App. 2008). Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999); *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources, and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id.* Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.,* 109 P.3d 604 (Colo. 2005).

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[3] The doctrines of "issue preclusion" and "claim preclusion" generally refer to the preclusive doctrines formerly called "collateral estoppel" and "res judicata". *Gallegos v. Colorado Groundwater Commission,* 147 P.3d 20, 24, n2 (Colo. 2006).

The doctrine of issue preclusion prevents relitigation of an issue when the following apply: "(1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *Sunny Acres Villa, Inc.*, 25 P.3d at 47

In the case at bench, the identical issue of reopening was considered and decided. The identical issue was previously before ALJ Cain, who issued an order thereon. Claimant did not appeal the order issued by ALJ Cain when he determined that the claim was closed. There was an identity of parties that litigated this issue at the hearing before ALJ Cain. ALJ Cain's FFCL was final. Claimant had a full and fair opportunity to litigate this issue in the prior hearing and appeal the ALJ's FFCL if dissatisfied. No petition to review was taken and the decision is final. Therefore, the doctrine of claim preclusion bars a retrial of issues already litigated by the parties. *State Compensation Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (Colo. 1964).

Based upon the foregoing, the undersigned ALJ determines that there is no triable issue of material fact. Respondents' motion for summary judgment is properly granted on Claimant's petition to reopen.

ORDER

It is therefore ordered that:

1. Respondents' Motion for Summary Judgment is granted.

2. Claimant's Petition to Reopen is denied and dismissed.

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

4. The hearing set for October 16, 2015 to in Greeley, Colorado is vacated.

5. This Order does not affect Claimant's right to *Grover* medical benefits.

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

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

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

DATED: October 19, 2015

Digital signature

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that proposed disc replacement surgery constitutes reasonable and necessary medical treatment for the Claimant's industrial injury?

- Did Claimant prove by a preponderance of the evidence that the alleged need for disc replacement surgery was proximately caused by the industrial injury?

- Did Claimant prove by a preponderance of the evidence that Michael Janssen, D.O., is an authorized treating physician?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 11 were admitted into evidence. Respondents' Exhibits A through P were admitted into evidence.

2. On May 12, 2006 Claimant reported to the St. Anthony Hospital North emergency room (ER) that she awoke with lower back pain. Claimant had a negative straight-leg test but had "exquisite tenderness to even light palpation along her mid lumbar spine." Lumbar x-rays were taken and "degenerative disc disease" (DDD) was noted. The Claimant as admitted to the hospital in "fair condition."

3. While at St. Anthony North Claimant was treated by Michele Pennington, M.D., and Elizabeth McClard, M.D. Claimant reported that she had experienced back pain for 5 days. The Claimant was reportedly doing "light house work" when her back began to feel tight. These physicians noted "exquisite tenderness" from L4 to S1 along the spine, but no paraspinal muscle tenderness or spasm. They assessed low back pain of unknown etiology, "likely musculoskeletal but cannot rule out paraspinal abscess."

4. Claimant allegedly suffered a low back injury while working for the employer on November 8, 2008. This injury allegedly resulted from lifting bags of chicken and cooking chicken.

5. From November 2008 through December 8, 2008 David Schaut, M.D., of Concentra treated Claimant for the alleged back injury. On November 13, 2008 Dr. Schaut treated Claimant for a chief complaint of "back pain." Dr. Schaut assessed a "lumbar strain, improved." Dr. Schaut noted that the day before Claimant had undergone an injection for back pain. Dr. Schaut imposed work restrictions and referred

Claimant for chiropractic treatment. On November 20, 2008 Claimant advised Dr. Schaut that she was undergoing chiropractic treatment and was "significantly better." Claimant asked to be relieved of work restrictions and Dr. Schaut complied.

6. On December 9, 2008 Dr. Schaut noted Claimant did well with chiropractic treatment and believed she could be discharged. Dr. Schaut opined that Claimant reached maximum medical improvement (MMI) with no impairment.

7. On March 19, 2009 Claimant underwent lumbar spine x-rays at the request of her primary care physician (PCP), Mark Englestad, M.D. The radiologist noted L4-5 disc space narrowing with mild endplate spurring "consistent with" degenerative disc disease (DDD). The radiologist also noted "slightly lesser changes" at L3-4. The radiologist assessed mild to moderate multilevel DDD greatest at L3-4 and L4-5.

8. Dr. Englestad examined Claimant on March 27, 2009. Claimant gave a history that her back had been hurting for three days. Dr. Englestad prescribed Percocet.

9. Based on Dr. Engelstad's referral Claimant underwent a lumbar MRI on April 2, 2009. The radiologist noted mild bilateral facet arthropathy at L1-2, L2-3 and L5-S1. At L3-4 the radiologist noted "diffuse disk bulging" and mild bilateral facet arthropathy. At L4-5 the radiologist noted "mild diffuse disk bulging," bilateral facet arthropathy resulting in "moderate right and mild left neural foraminal narrowing including abutment of the exiting right L4 nerve root" and a "focal high intensity zone in the posterior disc." The radiologist assessed mild diffuse L4-5 disk bulging "asymmetric to the right" abutting the L4 nerve root and a "small annular tear in the posterior disk."

10. On April 8, 2009 Hua Judy Chen, M.D., performed a neurological evaluation of Claimant. Dr. Englestad referred Claimant to Dr. Chen based on reported left leg weakness. Claimant gave a history of back pain "probably for many years" and reported that on one occasion her back pain required treatment. However, Claimant also told Dr. Chen "all of her problems are few months." Dr. Chen opined Claimant was a "very poor historian." Dr. Chen's impressions included multiple symptoms "that I can not [sic] explain from local disc problem from the back." Dr. Chen opined Claimant needed treatment for her low back pain to be arranged by Dr. Englestad or a specialist.

11. On May14, 2009 Dr. Chen performed electrodiagnostic testing of the left lower extremity. Dr. Chen noted "mild distal motor latency but non-specific." Dr. Chen stated there was no peripheral neuropathy or lumbar radiculopathy to explain the weakness.

12. On May 30, 2009 Claimant was referred Claimant for orthopedic examination at "Panorama."

13. On June 10, 2009 Lonnie Loutzenhiser, M.D., of Panorama Orthopedics and Spine Center examined Claimant. Claimant reported her low back pain had

"gradually worsened over the last few months" and that the pain occasionally radiated into her buttocks bilaterally. Dr. Loutzenhiser reviewed the MRI results. He assessed spondylosis without myelopathy at L4-5 and L5-S1, a "herniated disc" at L4-5 and bilateral foraminal stenosis at L4-5 greater on the right than the left. Dr. Loutzenhiser recommended a lumbar epidural steroid injection (ESI).

14. On June 18, 2009 Claimant underwent an L4-5 transforaminal ESI. The history for this procedure was listed as "low back pain." On July 15, 2009 Claimant reported to Dr. Loutzenhiser that she received approximately 2 weeks of relief from the injection. However, her back and buttocks pain had returned. Dr. Loutzenhiser referred Claimant for physical therapy (PT) and prescribed NSAIDS. On August 18, 2009 Dr. Loutzenhiser noted that Claimant stated she did not respond to PT and NSAIDS.

15. On August 22, 2009 Claimant went to the emergency room with a complaint of back pain. Dr. Englestad was contacted and requested that Claimant be put on stronger medication (Dilaudid) and that she follow-up with him within 2 to 3 days.

16. On August 24, 2009 Dr. Englestad released Claimant from work until November 30, 2009.

17. On September 4, 2009 Claimant underwent another L4-5 transforaminal ESI. The history for this procedure was listed as "low back pain." However, on September 9 she reported (apparently to Dr. Englestad) that she "couldn't sit up" unless "something was behind her."

18. On September 16, 2009 Claimant filed a claim for benefits associated with the November 8, 2008 injury.

19. On September 28, 2009 Amit Agarwala, M.D., examined Claimant on referral from Dr. Englestad. Claimant reported back pain that occasionally spread into her buttocks bilaterally but denied "radiating symptoms in to her lower extremities." Dr. Agarwala reviewed the April 2009 MRI and noted a "diffuse disc bulge at L4/5." Dr. Agarwala assessed degenerative lumbar disc without myelopathy. He noted no radicular pain and stated that his exam was "consistent with muscular back pain." He recommended PT, NSAIDS, muscle relaxants and pain management. Dr. Agarwala made no mention of surgery as a possible treatment.

20. On October 6, 2009 was apparently seen by Dr. Englestad. There is a notation in this record that indicates there could be some relationship between the November 8, 2008 injury and Claimant's ongoing back pain. The handwriting on this note is almost illegible and is difficult to decipher.

21. Between January 2010 and July 2014 Dr. Englestad frequently treated the claimant for a variety of medical issues including chronic low back pain. During this period of time Dr. Englestad regularly prescribed narcotic medications including oxycodone and fentanyl.

22. On January 12, 2010 George Kohake, M.D., examined Claimant at Concentra. Dr. Kohake performed this examination at the request of the insurance adjuster and was asked to evaluate the cause of Claimant's "chronic low back pain symptoms." On examination Dr. Kohake noted "no sciatic symptoms with nerve tension maneuvers" and that Claimant had "5/5 Waddell signs with scalp compression, light touch, pseudorotation, non-physiologic exam findings, and excessive symptom response."

23. On January 20, 2010 and March 17, 2010 the claim proceeded to hearing before ALJ Felter. Claimant sought a determination that she sustained a compensable low back injury on November 8, 2008, medical benefits and temporary total disability benefits commencing August 24, 2010.

24. On May 10, 2010 ALJ Felter entered Corrected Full Findings of Fact, Conclusions of Law and Order (FFCL). ALJ Felter found that Claimant sustained a compensable low back injury on November 8, 2008. ALJ Felter expressly found that "removing the chicken from the bags, coupled with Claimant's stress by virtue of employees leaving the job, was sufficient to aggravate [Claimant's] underlying low back condition." ALJ Felter also found that Claimant's back condition worsened after she was placed at MMI on December 9, 2009 and this worsening "was due to the natural progression of the November 8, 2008, injury." ALJ Felter concluded Claimant was entitled to TTD benefits commencing August 24, 2009, when Dr. Englestad restricted her from returning to work.

25. On August 24, 2010 Dr. Englestad noted that Claimant had symptoms of right leg pain and back pain of two years' duration. Dr. Englestad opined these symptoms were "work comp related."

26. Respondents appealed ALJ Felter's FFCL to the Industrial Claim Appeals Office (ICAO). On October 7, 2010 the ICAO affirmed ALJ Felter's determination that Claimant sustained a compensable injury in November 2008. However, the ICAO set aside the award of TTD benefits. The ICAO concluded that Claimant was not entitled to TTD benefits because she was placed at MMI by an ATP in December 2008. The ICAO reasoned that no TTD benefits could be awarded after MMI until a Division-independent medical examination (DIME) was conducted to review the ATP's MMI determination. Claimant and Respondents both appealed the ICAO's rulings to the Court of Appeals.

27. On December 16, 2010 Dr. Englestad noted that he saw Claimant for "Workmans [sic] Comp" involving a "Herniated disc 08/08." He noted chronic problems of "LUMB/LUMBOSAC DISC DEGEN" and "LUMBAR DISC DISPLACEMENT."

28. On June 23, 2011 Dr. Englestad reported Claimant's back pain was "improving" although it was "aggravated by daily activities."

29. In an opinion announced October 13, 2011 the Court of Appeals ruled that there was substantial evidence in the record to uphold ALJ Felter's findings that the Claimant sustained a compensable injury in November 2008 and suffered a "worsening

of that condition in August 2009." However, the Court of Appeals set aside the ICAO's ruling that Claimant was precluded from receiving an award of TTD benefits commencing August 24, 2009. The court ruled that the Act does not preclude a "post-MMI worsening of condition in an open claim, particularly where such change would be sufficient to support a petition to reopen had the claim been closed" by a final admission of liability. The Respondents sought Supreme Court review of this ruling.

30. On September 19, 2011 Dr. Englestad noted that Claimant had lower back pain that "radiated to the bilateral hips and legs."

31. On January 5, 2012 counsel for Respondents sent a letter to Dr. Englestad advising him that the Respondents accepted "liability for your medical treatment related to" the November 8, 2008 injury and that he was "authorized to provide all treatment this is reasonable, necessary and related" to the injury.

32. On January 9, 2012 Dr. Englestad noted Claimant had pain in the lower back and L4-5. Dr. Englestad referred Claimant back to Dr. Agarwala. Dr. Englestad also requested another MRI.

33. On February 14, 2012 Claimant underwent a lumbar MRI. At L3-4 the radiologist noted mild "broad based disc bulging" that "abuts traversing L4 nerve roots but does compress or displace them." There was mild to moderate facet arthropathy. At L4-5 the radiologist noted broad-based "disc bulging which comes into close proximity with traversing right L5 nerve root but does not compress it or displace it." The radiologist opined there was no significant interval change since the MRI of April 2, 2009. He further opined there were multilevel "degenerative changes."

34. On February 23, 2012 Claimant returned to Dr. Agarwala. Claimant reported stabbing pain in her low back which occasionally radiated into her buttocks bilaterally. She described the pain as moderate to severe with associated muscle spasms. Dr. Agarwala reviewed the February 2012 MRI and conducted lumbar x-rays. Dr. Agarwala assessed spondylosis of the lumbar spine without myelopathy. His impressions included chronic lumbar pain with no radicular pain. The examination was "consistent with muscular back pain." He again recommended PT, NSAIDS, muscle relaxants and pain management.

35. On December 26, 2012 Dr. Englestad recorded that the Claimant's back pain was "fluctuating and persistent." The pain reportedly "radiated to the left thigh." The symptoms were "aggravated by activities of daily living."

36. On July 6, 2013 Dr. Englestad noted Claimant's back pain was "improving." He noted that the pain had "radiated into the bilateral hip and left leg." Symptoms were reportedly relieved by "pain meds/drugs."

37. Claimant was injured in a motorcycle accident on July 13, 2013. She was a passenger on the back of a motorcycle that crashed at a high rate of speed. She had a questionable loss of consciousness. She complained of lacerations to her head, left

clavicle and shoulder pain, right-hand pain and a laceration to her right knee. A CT scan of the head and cervical spine showed a subarachnoid hemorrhage and a nasal fracture and a possible hematoma or mass in her bladder. There was an extensive soft tissue injury to the right knee. She was diagnosed with closed head injury with subarachnoid hemorrhage, facial lacerations, knee injury, blunt abdominal trauma, and hematuria.

38. On October 31, 2013 Claimant was examined by PA Jeffrey Hilburn. In the history of present illness PA Hilburn noted Claimant's back pain was "acute on chronic." PA Hilburn further recorded that Claimant's "L-S" pain was "exacerbated" by the motor vehicle accident of July 13, 2013.

39. In an opinion issued January 27, 2014 the Supreme Court affirmed the judgment of the Court of Appeals. The Supreme Court reviewed the statutory scheme and concluded that a finding of MMI "has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place." The court reasoned that Claimant's failure to obtain a DIME to review the ATP's finding of MMI was inconsequential because Claimant's "injury did not become compensable until her condition worsened and she was forced to lose in excess of three days of work time."

40. On May 6, 2014 Dr. Englestad saw the Claimant for "workmans comp, back pain and medication refill." Dr. Englestad reported Claimant's pain was in the "lower back" and was "stable." There was "some pain" down the left leg. Dr. Englestad noted that he discussed MMI with Claimant" and that she "would like to see Dr. Morreale" to consider injections. Dr. Englestad discussed with Claimant the "importance of quitting smoking" and advised Claimant to begin exercising.

41. On July 11, 2014 Dr. Englestad assessed low back pain and prescribed Percocet and ibuprofen. Dr. Englestad wrote stated "spine doc in next 1 month – expect MMI 1 - 2 months." Dr. Englestad advised Claimant to "quit tobacco completely."

42. On August 13, 2014 Claimant underwent another lumbar MRI. The results of August 2013 MRI were compared to the February 14, 2012 MRI. The radiologist opined there was "no significant change from 2/14/2012." The radiologist further noted an L4-5 disc bulge, which abuts but does not displace the traversing right L5 nerve root." The mild to moderate right and mild left foraminal stenosis was "unchanged."

43. On August 21, 2014 Dr. Englestad noted Claimant "is set up to see spine specialist on 9/11/14." Claimant reported she was smoking less and wanted to quit smoking "after the first of the year."

44. On September 11, 2014 Michael Janssen, D.O., examined Claimant. In his report Dr. Janssen noted a history that Claimant sustained a work-related back injury in 2008 and had been unable to work since 2009. Dr. Janssen stated Claimant "had to go through a variety of legal hoops to get appropriate definitive medical/surgical treatment" and had "severe, unrelenting radicular pain." On physical examination Dr.

Janssen recorded that "repetitive standing on the right and left lower extremities was "+5/5 in all major muscle groups." The Claimant had a "negative stretch root sign posteriorly and severe axial back pain." Dr. Janssen reviewed the MRI "imaging" from February 14, 2012 and August 13, 2013. Dr. Janssen opined the imaging studies demonstrate "vertical instability, collapse, and a disc herniation with Modic changes at the L4-5 level." He assessed a disc herniation "eccentering to the left with vertical instability, disease, and significant collapse at L4-L5."

45. Dr. Janssen wrote that Claimant could treat her problem anatomically by a "minimally invasive" micro decompressive procedure at L4-5 or a "definitive procedure" such as an arthrodesis or arthroplasty. Based on Claimant's smoking history and weight of 183 pounds Dr. Janssen recommended Claimant undergo a "total disc arthroplasty at L4-5 with complete disc space evacuation." Dr. Janssen opined that Claimant's "outcome is clearly unfortunately parallel due to the long legal system it took for her to get to this point."

46. On November 8, 2014 Michael Rauzzino, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Rauzzino is board certified in neurosurgery and is level II accredited. In connection with the IME Dr. Rauzzino took a history from Claimant, performed a physical examination and reviewed extensive medical records.

47. In his written report Dr. Rauzzino opined that Claimant suffered no acute "structural injury" to her lumbar spine as a result of the November 8, 2008 work injury. Rather he opined Claimant sustained a flare of chronic degenerative disease for which she was treated in the past and that she had an acute episode of lumbar strain which had resolved by December 2008 when she would have reached MMI. In support of this opinion Dr. Rauzzino stated that his review of the lumbar spine MRI imaging revealed "chronic degenerative changes" of the lumbar spine without "fracture or large acute disc herniation."

48. Dr. Rauzzino opined that the arthroplasty proposed by Dr. Janssen is not related to the November 2008 industrial injury and is not "reasonable and necessary." Dr. Rauzzino stated that Janssen did not "accurately" report Claimant's "complaints" or her radiographic findings. Dr. Rauzzino explained that although Dr. Janssen reported that Claimant has unrelenting L5 radicular pain he also noted normal strength and sensation in the L5 dermatome. Dr. Rauzzino further opined that the pain Claimant reported in her buttocks is not "clearly in an L5 radicular pattern" and that Claimant's "basic complaint" is axial back pain rather than radicular pain. Dr. Rauzzino also stated there is "no recent evidence" that the L4-5 level is a "specific pain generator that might require surgical treatment." He stated that Claimant has not had "recent therapy," she has not undergone diagnostic injections and does not have a radicular component to her pain that localizes to the L4-5 level. Dr. Rauzzino opined Claimant clearly "does not meet the workers' compensation guidelines for having a pain generator identified and treated conservatively prior to proceeding with lumbar fusion." Dr. Rauzzino also stated that Claimant would have to stop smoking in order to undergo "any sort of large

surgery." He noted that on the date of examination Claimant continued smoking one pack of cigarettes despite suffering a heart attack.

49. On May 19, 2015 PA Jeffrey Woody examined Claimant for several problems including abdominal pain and back pain. PA Woody noted that he reviewed the PDMP and this revealed Claimant had been "getting opiate Rxs from a number of medical providers" including percocet from a "Paul Suding in 2/15." PA Woody also noted Claimant had a history of coming into the "clinic early for refills." PA Woody noted Claimant had a "medication agreement" with the practice. Claimant denied that she had a "problem" with opiate abuse or that she was "seeking these medications." Claimant refused a referral to see substance abuse provider. PA Woody discussed the case with Dr. Englestad and it was agreed that the office would no longer prescribe pain medications to Claimant. Although Claimant was not formally dismissed from treatment she stated that she would consider finding a new PCP.

50. Dr. Rauzzino testified at the hearing. Generally, Dr. Rauzzino's testimony was consistent with the opinions he expressed in his written report.

51. Dr. Rauzzino testified that he disagrees with Dr. Janssen's diagnosis of L4-5 radiculopathy as a basis for performing a disc replacement surgery. Dr. Rauzzino stated that L5 radiculopathy would result from compression of a nerve root and cause pain running down the back of the leg to the top of the foot with accompanying foot numbness and weakness. However, Dr. Rauzzino explained that based on his review of the medical records and his own examination Claimant described "at least 90 percent axial pain meaning that the primary problem was pain in the back, not down the leg." Dr. Rauzzino further testified that he reviewed the MRI images taken since November 2008 and, contrary to Dr. Janssen's opinion, they do not reveal a "herniated disc" as L4-5. Dr. Rauzzino explained that the term "disc herniation" is different from "disc bulge" and that none of the radiologists who reviewed the post-injury MRI's indicated the presence of a "herniated disc" at L4-5. Dr. Rauzzino explained that treating radiculopathy with surgery has a high rate of success because a specific anatomical structure is pressing against an identifiable nerve root. However, he opined that treating axial back pain with surgery is much more "problematic." Dr. Rauzzino explained there are many structures is the back that can generate back pain and unless the specific pain generator can be identified surgery for treatment of axial back pain has a "fairly high" rate of failure.

52. Dr. Rauzzino further opined that Claimant's "subjective complaints were difficult to correlate anatomically." Dr. Rauzzino testified that he performed "Wadell testing" as part of his examination in order to help determine whether Claimant was accurately reporting her symptoms. Dr. Rauzzino noted that Claimant reportedly experienced increased pain when Dr. Rauzzino pressed on her head and when he "lightly touched her back." Dr. Rauzzino explained that these maneuvers did not place pressure on the discs and would not have resulted in increased pain if a disc was the actual pain generator. Dr. Rauzzino noted that Dr. Kohake and Dr. Chen reported similar findings when they examined Claimant.

53. Dr. Rauzzino reiterated that he did not see any "structural problem" that explains the Claimant's symptoms. Dr. Rauzzino stated that Dr. Janssen's diagnosis of "vertical instability" did not make any sense. Dr. Rauzzino explained that the term "vertical instability" is not commonly used in medical practice and was not noted on any of the "x-ray studies."

54. Dr. Rauzzino testified that he disagreed with Dr. Janssen that Claimant has "collapse" of the L4-5 disc. Dr. Rauzzino explained that if the disc had collapsed there would "not be a lot of cushion between the two bones" and the collapsed space would "look a lot smaller" compared to other disc spaces. However, Dr. Rauzzino explained that when he "looked at the pictures" (presumably the MRI's and x-rays) and "none of the disc heights looked dramatically different." Dr. Rauzzino also noted that none of the radiologists had assessed "disc space collapse."

55. Dr. Rauzzino opined that the Claimant does not satisfy the Medical Treatment Guidelines (MTG) guidelines for the performance of disc replacement surgery. Dr. Rauzzino explained that although surgeons have a "fair bit of discretion" when deciding to perform surgery, the MTG "provide a set of guidelines to determine which patients might have the best chance in benefitting from such a surgery." Dr. Rauzzino testified that the MTG criteria for disc replacement surgery are the same as those for lumbar fusion surgery. Dr. Rauzzino explained that the MTG require that the patient have disease confined to a "single level" and that a pain generator be "specifically identified." Further, the MTG require that prior to surgery all other therapies must be exhausted. Dr. Rauzzino opined that the MRI's demonstrate the Claimant has pathology at more than one level. Further, Dr. Rauzzino testified that a specific pain generator has not been identified and that he was unable to find a specific pain generator on his examination. Finally, Dr. Rauzzino opined Claimant has not exhausted conservative therapy.

56. Dr. Rauzzino testified that Claimant's inability to completely stop smoking is a negative indication for surgery under the MTG. Dr. Rauzzino explained that smoking can inhibit the "ingrowth of bone" required for successful surgery. Further, the inability to stop smoking is an indicator that the patient will not have the discipline to comply with the rehabilitation program necessary to recover from surgery.

57. At Respondents' implicit request (as reflected by their position statement) the ALJ takes administrative notice of certain provisions of WCRP 17, Exhibit 1, Low Back Pain Medical Treatment Guidelines.

58. The ALJ notices that WCRP 17, Exhibit 1, G (11) is the provision of the MTG that addresses "Artificial Lumbar Disc Replacement." WCRP 17, Exhibit 1,G (11) (a) provides that:

> General selection criteria for lumbar disc replacement includes symptomatic one-level degenerative disc disease. The patient must also meet fusion surgery criteria, and if the

> patient is not a candidate for fusion, a disc replacement procedure should not be considered.

59. The ALJ notices that WCRP 17, Exhibit 1,G (11) (c) provides that surgical indications for disc replacement surgery include but are not limited to the following:

> Symptomatic one level degenerative disc disease established by objective testing (CT or MRI scan followed by [positive provocation discogram]);
>
> All pain generators are adequately defined and treated;
>
> Spine pathology limited to one level; and
>
> Psychosocial evaluation with confounding issues addressed.

60. The ALJ notices that WCRP 17, Exhibit 1,G (11) (d) provides that contraindications for disc replacement surgery include but are not limited to the following"

> Multiple-level degenerative disc disease (DDD).

61. The ALJ notices that WCRP 17, Exhibit 1,G (4)(e)(vi), concerning lumbar fusion surgery provides that injured worker refrain from smoking for at least six weeks prior to the surgery and during the period of fusion healing.

62. Claimant failed to prove it is more probably true than not that the disc replacement surgery proposed by Dr. Janssen constitutes reasonable and necessary medical treatment for the industrial injury. To the contrary, the weight of the credible and persuasive evidence establishes that the proposed surgery is not reasonable and necessary to treat Claimant's symptoms.

63. The ALJ credits Dr. Rauzzino's opinion that Claimant does not have any "structural injury" that would justify performance of the disc replacement surgery recommended by Dr. Janssen. Dr. Rauzzino reviewed the MRI studies performed after November 2008 and opined they do not show a "herniated disc" at L4-5. Dr. Rauzzino also credibly and persuasively testified that based on his examination and review of the medical records Claimant has reported substantially more "axial back pain" than radicular pain.

64. Dr. Rauzzino's opinion that the Claimant does not have an L4-5 disc herniation is corroborated by the radiologists' reports of April 2, 2009, February 14, 2012 and August 13, 2014. In April 2009 the radiologist described L4-5 as exhibiting "mild diffuse disk bulging" that was asymmetric to the right. The radiologist did not report a disc "herniation" at L4-5. In February 2014 the radiologist described L4-5 as

exhibiting "disc bulging that comes into close proximity with the traversing right L5 nerve root but does not compress it or displace it." The radiologist did not report a disc "herniation" at L4-5. In August 2014 the radiologist described L4-5 as exhibiting a "disc bulge" abutting but not displacing the right L5 nerve root." The radiologist did not report a disc "herniation" at L4-5. Dr. Rauzzino's opinion is further supported by Dr. Agarwala who reviewed the April 2009 MRI and reported only a "diffuse disc bulge" at L4-5.

65. Dr. Janssen's opinion that Claimant has an L4-5 disc herniation is not persuasive. Dr. Janssen described the alleged herniation as "eccentering to the left" and producing L5 radiculopathy. However, the radiologists who performed the MRI's have described L4-5 as exhibiting "diffuse" disc bulging and "broad based disc bulging" that abuts but does not displace the *right* L5 nerve root. (Emphasis added.) Dr. Janssen did not persuasively explain a basis for the differences between his opinions and those of the radiologists. Neither did Dr. Janssen persuasively refute Dr. Rauzzino's opinion that Claimant does not have a "disc herniation" at L4-5.

66. To the extent Dr. Englestad and Dr. Loutzenhiser opined the claimant has a "herniated disc" at L4-5 they did not credibly and persuasively explain why their opinions are different than those of the radiologists, Dr. Agarwala and Dr. Rauzzino.

67. Dr. Rauzzino credibly and persuasively opined that Claimant does not have "severe, unrelenting L5 radiculopathy" as diagnosed by Dr. Janssen. Dr. Rauzzino correctly and persuasively observed that Dr. Janssen's own physical examination of Claimant resulted in findings of normal strength and sensation in the L5 dermatomes. Dr. Rauzzino persuasively opined, based on his examination of Claimant and review of the medical records that the vast majority of Claimant's pain has been "axial" rather than "radicular" in nature. The ALJ finds from the medical records that, although the Claimant occasionally reported radicular-type symptoms of pain radiating into her buttocks and legs, it is also true Claimant frequently did not report any radicular symptoms. For instance, on September 28, 2009 Dr. Agarwala noted there was no radicular pain. On January 12, 2010 Dr. Kohake noted there were no sciatic symptoms with nerve tension maneuvers. On February 23, 2012 Dr. Agarwala again reported claimant had lumbar pain with no radicular pain. The ALJ further finds that even Dr. Janssen acknowledged in his report that Claimant has severe axial back pain in addition to the alleged radicular pain. No physician, except Dr. Janssen, has opined that Claimant suffers L5 radiculopathy that should be treated with surgery.

68. Moreover, Dr. Rauzzino credibly and persuasively opined that Claimant's reports that she suffers from symptoms are not reliable. Dr. Rauzzino explained that on Waddell testing Claimant reported experiencing increased symptoms when he performed maneuvers that did not place any pressure on the disc space, Dr, Rauzzino's opinion that Claimant cannot be relied upon to accurately report symptoms is corroborated by the opinions notes of Dr. Kohake and Dr. Chen.

69. Dr. Rauzzino credibly and persuasively opined that Claimant does not have a "collapsed disc" at L4-5. Dr. Rauzzino persuasively explained that the term

"collapsed" disc has a specific meaning and is evidenced by notable loss of height in the disc space when compared to other discs spaces. Dr. Rauzzino persuasively testified that he reviewed the MRI's and they do not demonstrate collapse of the L4-5 disc space. Dr. Rauzzino's opinion is corroborated by the three radiologists who reviewed the serial MRI's taken since Claimant's 2008 injury. None of the radiologists opined that Claimant has a "collapse" of the L4-5 disc space. Instead, the radiologists have described disc "bulging" at L4-5.

70. Dr. Rauzzino persuasively opined that Dr. Janssen's diagnosis of "vertical instability" lacks a meaningful medical definition. The ALJ notes that no physician except Dr Janssen has suggested a diagnosis of "vertical instability." None of the radiologists opined that the MRI's exhibit spinal "instability" of any type.

71. Based on these findings the ALJ determines that Dr. Janssen is proposing to perform disc replacement surgery to correct symptoms caused by diagnoses that do not exist. Further, Dr. Rauzzino persuasively explained that performance of disc replacement surgery to treat primarily axial back pain has a high rate of failure. The ALJ finds it is not reasonable or necessary to perform disc replacement surgery based on incorrect diagnoses because there is a significant possibility that the surgery will not relieve the Claimant's symptoms and may even complicate Claimant's condition.

72. Dr. Rauzzino credibly and persuasively opined that performance of the surgery recommended by Dr. Janssen would contravene the MTG criteria applicable to disc replacement surgery Dr. Rauzzino credibly and persuasively opined that the MTG require that in order to perform disc replacement surgery the patient should have disease restricted to one level with a specifically identified pain generator. Dr. Rauzzino correctly noted that MRI's demonstrate spinal disease at multiple levels and that no specific pain generator has been identified. As explained by Dr. Rauzzino, there is no confirmation that L4-5 is generating Claimant's pain. Indeed, the MRI's establish that Claimant has DDD at multiple levels of the lumbar spine. Dr. Janssen did not offer any credible and persuasive explanation of why the proposed surgery complies with the MTG.

73. The ALJ finds that Dr. Janssen's failure to comply with the MTG for disc replacement surgery constitutes highly persuasive evidence that performance of the surgery is not reasonable and necessary under the facts of this case.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation

case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

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

REASONABLENESS AND NECESSITY OF PERFORMING SURGERY

Claimant argues a preponderance of the evidence establishes that it is reasonable and necessary to perform the disc replacement surgery proposed by Dr. Janssen. Claimant further argues that the need for this surgery was proximately caused by the November 2008 industrial injury. The ALJ concludes that a preponderance of the credible evidence establishes that the proposed surgery is not reasonable and necessary to treat Claimant's condition.

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 of the MTG. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of whether medical treatment is reasonable and necessary. Section 8-43-201(3), C.R.S. Rather, the ALJ may weigh evidence of compliance or non-compliance with the MTG and give it such weight as he determines is appropriate 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).

As determined in Findings of Fact 62 though 73 the ALJ finds that a preponderance of the credible and persuasive evidence establishes that performance of the disc replacement surgery recommended by Dr. Janssen is not reasonable and necessary to treat the effects of the industrial injury. The ALJ is persuaded by Dr. Rauzzino's testimony and opinions that the Claimant does not actually have any of the conditions diagnosed by Dr. Janssen. The ALJ is further persuaded by Dr. Rauzzino's opinion that under these circumstances performance of the disc replacement surgery is not reasonable and necessary to treat the Claimant's injury. The ALJ is further persuaded that performance of the surgery would contravene the applicable MTG

because Claimant has multi-level disc disease and no specific pain generator has been identified. As determined in Finding of Fact 73, the ALJ places great weight on the evidence establishing that the surgery would be contrary to the MTG for disc replacement surgery.

The ALJ notes that Claimant has argued Dr. Rauzzino's testimony should not be found persuasive because it was "in direct opposition" to ALJ Felter's finding that Claimant's "low back condition worsened on August 24, 2009." At the hearing Claimant's counsel suggested that it is "law of the case" that Claimant sustained a compensable injury.

The ALJ understands that Claimant's reference to "law of the case" as constituting an argument that ALJ Felter's order creates "issue preclusion" with regard to the question of whether the proposed surgery is reasonable and necessary to treat the Claimant's injury. The ALJ disagrees with this assertion.

The elements of issue preclusion are: "the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. App. 2001).

The ALJ concludes that the issue of whether disc replacement surgery is reasonable and necessary to treat the conditions diagnosed by Dr. Janssen was not determined by ALJ Felter's order. It may be that Dr. Rauzzino disagrees with ALJ Felter concerning the exact nature of the Claimant's initial "injury." Regardless, ALJ Felter did not find that the Claimant's "worsened condition" resulted from an L4-5 disc herniation, L5 radiculopathy, disc collapse and/or "vertical instability." Consequently, ALJ Felter was not asked to determine and did not determine whether Claimant had any of these conditions or whether it would be reasonable and necessary to operate on these conditions. Consequently, the ALJ concludes that ALJ Felter's order has no preclusive effect with regard to the factual and legal issues determined by this order.

In light of these conclusions the ALJ need not determine the other issues raised by the parties.

MOTION TO ADMIT ADDITIONAL EVIDENCE

On October 21, 2015 Respondents filed an opposed motion to submit additional evidence. The ALJ denies this motion.

First of all, the Respondents have prevailed on the merits so their request to submit additional evidence is essentially moot.

Even if the motion were not moot the ALJ finds Respondents failed to show good cause to submit additional evidence. The ALJ has reviewed the proposed evidence and finds that it is only modestly relevant to the Claimant's credibility on a rather tangential issue. Consequently, the ALJ concludes this evidence is unlikely to have had much influence on the outcome of the case, and the Respondents have obtained a favorable result without consideration of the evidence. Moreover, the ALJ concludes the value of this evidence to Respondents' case is outweighed by the inconvenience and expense to the Claimant of having to respond to the proffered evidence at this very late stage of the proceedings.

The motion to submit additional evidence is denied.

ORDER

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

1. The Claimant's request to undergo the disc replacement surgery proposed by Dr. Janssen is denied because the surgery is not reasonable and necessary.

2. The Respondents' motion to submit additional evidence is denied.

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

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

DATED: October 22, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge

#JD1V419S0D0WVDv 2

ISSUES

The issues presented for determination are as follows:

- Whether a Ketamine infusion recommended by Claimant's physicians is reasonable, necessary and related medical treatment.

- Claimant also alleged that Respondent committed a violation of WCRP Rule 16 by failing to timely deny an authorized medical provider's request for the Ketamine infusion. Respondent contends that it never received a proper Rule 16 request thus the Rule 16 deadlines were never triggered.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on September 18, 2009 while working in the course and scope of her employment. At the time of her injury Claimant worked as a police officer for the Employer.

2. Claimant has treated with Drs. Koval, Kistler, Hemler, Orent, and Gesquiere for her industrial injury. Claimant also testified that all her treating doctors are in agreement that she currently suffers from systemic (full body) Complex Regional Pain Syndrome ("CRPS").

3. In a report dated December 28, 2010 Dr. Kistler confirms that Dr. Gottlob is convinced Claimant has RSD (also known as Regional Sympathetic Dystrophy now known as CRPS.)

4. Dr. Kistler's report of April 13, 2011 outlines that Claimant "states almost any activity with the left arm tends to flare her up. Now she is getting a new sensation of heat in the left hand. This occurred in the shower. She thought surely she had touched a hot curling iron, but it turns out that the curling iron was not on at all. She has had this several times, three in the last week each lasting about five seconds. She still gets the cold sweats in the left arm. There is numbness and tingling in the area of the right trapezius, but not so much pain."

5. Claimant has undergone a bone scan, thermogram, and ganglion blocks. Based on the results of those procedures her treating doctors have confirmed her diagnosis of CRPS.

6. Claimant was placed at maximum medical improvement ("MMI") on May 31, 2011. On the Final Admission of Liability dated February 13, 2012 Respondents specifically state "Respondents admit for future medical care that is reasonable,

necessary, and related to the injury of 9/18/2009 as outlined in the attached report from Dr. Kistler dated 5/31/2011."

7. In his rating report of May 31, 2011 Dr. Kistler outlines that during the course of her treatment for her admitted workers' compensation injury, Claimant was diagnosed and treated for CRPS. Dr. Kistler further states, "Dr. Hemler did a series of five injections. After sympathetic block, she indicated she had an amazing response feeling like she was in heaven. Unfortunately, that only lasted a few days, but given her clinical circumstances, confirms CRPS." As a result of the CRPS diagnosis, Dr. Kistler assigned a 20% whole person rating for "Non-preferred Extremity Difficulty with Self Care due to CRPS" pursuant to Table 1, page 109 of the AMA guides.

8. Respondent filed a Final Admission of Liability that admitted for the rating attributed to Claimant's CRPS diagnosis, and specifically referenced Dr. Kistler's May 31, 2011 report. Respondent, therefore, admitted that Claimant's diagnosis of CRPS was related to her workers' compensation claim.

9. In his report of November 11, 2011 Dr. Hemler states that Claimant "returns today in follow-up, having recently completed a stress thermogram of both upper extremities. The study was positive in all three aspects regarding complex regional pain syndrome."

10. In a letter dated January 9, 2012 Dr. Kistler stated that Claimant's left shoulder injury led to severe CRPS that has not responded to standard therapy.

11. The May 8, 2012 report from Dr. Kistler notes Claimant "still has the fiery pain not only in the bilateral upper extremities but now some in the legs as well."

12. Per his December 5, 2013 report, Dr. Sander Orent assumed Claimant's care. He noted that he reviewed Dr. Hemler's notes and a good part of Claimant's medical record. Dr. Orent made two recommendations – laboratory tests to rule out inflammatory arthritis; and the possibility of exploring "a low-dosage ketamine infusion." Dr. Orent noted that the Claimant would think about it and research it a bit, and if she wanted to move forward Dr. Orent would work with Dr. Hemler to "orchestrate a consultation with Dr. Michael Gesquiere who does this procedure in Denver."

13. Dr. Hemler's February 5, 2014 report documents Claimant's diagnosis of CRPS, and that Claimant wished to pursue the ketamine infusion consultation. Dr. Hemler noted that he spoke to Dr. Orent about the ketamine infusion and that Dr. Orent supported a referral to Dr. Gesqueri.

14. In a February 13, 2014 M-164 form, Dr. Koval states a diagnosis of "systemic CRPS." Dr. Koval also states "approval requested for ketamine."

15. Dr. Koval's February 13, 2014 report states "At this point, low-dose ketamine infusion is being explored and her Pain Management specialist, Dr. Hemler, is attempting to obtain approval for this." Dr. Koval's report also states, "We await

approval for the aforementioned procedures (i.e. ketamine infusion and referral to a nationally recognized pain clinic)."

16. Dr. Hemler states in his report of March 5, 2014, "The patient returns today in follow-up for ongoing pain associated with complex regional pain syndrome of the left upper extremity/shoulder with noncontiguous spread throughout the body."

17. A fax cover sheet note dated March 5, 2014 documents that Dr. Hemler called and left the adjuster, Sandra O'Brien a voice mail requesting approval for a ketamine infusion consultation with Dr. Gesquiere. The note also asks that O'Brien respond and let Dr. Hemler's office know if Claimant is permitted to keep an appointment with Dr. Gesquiere. Dr. Hemler's office attached seven pages, including Dr. Hemler's February 5, 2014 report.

18. Dr. Orent's April 3, 2014 M-164 form report again states "CRPS – ketamine pending." In his narrative report from that date, Dr. Orent notes that Claimant "is not working, but states she would if the ketamine were to have substantial benefits. If she could go back to work, she would certainly be willing to do this. I would not rule this out at this time because ketamine has on occasion been extremely effective in reversing this condition, basically re-setting the sympathetic nervous system. If this were to happen, this would be a significant change in our long-term planning; however, if the best we got is significant pain relief, then we will be pleased with that." Dr. Orent noted Claimant had been approved for a ketamine consultation, and would be seeing Dr. Gesquiere within the next couple of weeks.

19. On June 25, 2014 Dr. Michael Gesquiere evaluated Claimant regarding the ketamine infusion. In his report, Dr. Gesquiere noted that reviewed Claimant's workup. Dr. Gesquiere concluded that he agrees with Drs. Hemler and Orent that the Claimant had exhausted conservative treatment for her CRPS. He stated that Claimant is an excellent candidate for Stamford infusion protocol therapy. Dr. Gesquiere discussed the therapy at length with the Claimant and she elected to proceed.

20. In Dr. Koval's July 29, 2014 report, she stated that Claimant had a consultation with Dr. Gesquiere regarding the ketamine infusion treatment, and that Dr. Gesquiere had requested authorization from the Respondent. Dr. Koval intended to ask her clinic manager to contact the Respondent on behalf of the Claimant regarding the authorization for the ketamine infusion.

21. Dr. Koval's report dated August 26, 2014 states again that Claimant had a consultation with Dr. Gesquiere and that he agreed the ketamine infusion treatment was a good option for her. Dr. Koval noted that, "Authorization has been requested from Workers' Compensation but nothing has happened yet."

22. Claimant's attorney issued a letter to Drs. Orent and Koval dated September 10, 2014. The letter contains specific questions in order to clarify the request for the ketamine infusion, as well as to explain the reasonableness and the

medical necessity of the requested treatment. Drs. Orent and Koval answered the letter and signed their responses dated September 18, 2014.

23. The September 10, 2014 letter and the responses dated September 18, 2014 from Drs. Orent and Koval states as follows:

> 1. What is [Claimant's] current diagnosis?
> Systemic CRPS (complex regional pain syndrome)
>
> 2. What are [Claimant's] current treatment needs/recommendations?
> Pain control: acupuncture 2-3x/wk, massage therapy 1x/wk, medications (per Pain Mgmt. specialist) – Cymbalta, Topamax, Marinol
> Ketamine infusion (pending)
>
> 3. Specifically, can you clarify [Claimant's] need for a Ketamine infusion and what consequences could result if such infusion is not authorized quickly?
> [Claimant's] pain symptoms are worsening with time, and generalizing to other parts of her body. She is also spending more time with less functionality secondary to pain. Her condition will likely continue to worsen.
>
> 4. What are [Claimant's] current work restrictions?
> Unable to work.
>
> 5. Are [Claimant's] current diagnosis, treatment needs/recommendations, and restrictions related to her workers' compensation injury?
> Yes.
>
> 6. Has [Claimant's] condition worsened since she was placed at MMI on May 31, 2012? If so please explain how [Claimant's] condition has worsened.
>
> Yes. What was originally a complex regional pain syndrome that began to generalize (2011) to her right side from the left, and into her lower extremities as well (2012). At this point, she has migrating pain that spares no body part.
>
> 7. Is there anything else you feel is relevant to [Claimant's] situation you would to clarify or add?
>
> In our clinic, 2 other patients with similar conditions have benefitted greatly from ketamine infusion, for which [Claimant] is considered an excellent candidate, per Dr. Gesquiere. One patient was able to stop all narcotic pain meds (15 years of use) after ketamine; another was able to undergo surgery for knee & hip injuries once ketamine was given, as surgery would

> not have been possible in the systemic CRPS state. We are confident that the nervous system "reset" provided by this procedure can help [Claimant] tremendously.

24. On October 27, 2014, Dr. Hemler authored a report which stated that Claimant's "most recent issues are an evolving pattern of dystonia which is a characteristic of CRPS. I highly support Dr. Orent's plan for this patient to undergo a trial of ketamine-based therapy as an option. Science on ketamine is reasonably good and would be reasonable for this patient."

25. Dr. Koval's report dated November 13, 2014 again confirms the diagnosis of systemic CRPS and documents that authorization for ketamine infusions is pending.

26. On May 28, 2015, Dr. Orent evaluated the Claimant. In his report he stated the following:

> I continue to believe that [Claimant] would benefit from ketamine infusion. I think she is a hardy enough person that she would tolerate this well and the procedure has become much better over the last couple of years. It is my understanding that a hearing is scheduled for June 21. I will simply say that I support the contention that she does indeed need ketamine and would be happy to testify to such at a hearing should I be asked to. [Claimant] overall is relatively stable. I think, however, that because we know so little about the course of generalized dysautonomia that I would be concerned that there is certainly the risk for a flare or worsening of conditioning with this disease. Therefore, this is why I am anxious to see her undergo the trial of ketamine. From the standpoint of work, she is not able to work. This is due to her medications. I would like to see her back after the hearing when we will have a better idea of what the legal system is going to allow us to do.

27. Claimant testified that her current symptoms include deep bone pain, pain in her joints, nausea, and vomiting. Claimant's pain can be debilitating as her symptoms wax and wane. The extensive medical record corroborates Claimant's testimony.

28. Claimant testified that she has comprehensively discussed the ketamine infusion with Drs. Hemler and Gesquiere. Claimant feels she is properly educated as to the ketamine infusion and potential side effects.

29. Claimant understands that she has exhausted all other treatment options. During the course of her treatment she has been prescribed the following: Amitriptyline, Fentanyl patches, Neurontin, Cymbalta, Nucynta, psychological counseling, MRI, biofeedback, sympathetic stellate ganglion blocks, physical therapy, Opana,

Methadone, Keppra, Baclofen, BuSpar, Dilaudid, Gabapentin,Tramadol, Trental, massage therapy, and acupuncture.

30. Claimant wishes to proceed with the ketamine infusion because her life is miserable and she would like to proceed in order to improve her function with the potential of long-term symptom relief.

31. As found above, Sandra O'Brien is an adjuster for the third party administrator. O'Brien testified that she has never received an authorization request for ketamine infusion treatment. She also testified that she did not receive a verbal request because if she had, she would have informed the provider to submit a written request.

32. O'Brien was aware of Claimant's appointment with Dr. Gesquiere on June 10, 2014 because she authorized the appointment. O'Brien was also aware that the appointment was for a consultation regarding the ketamine infusion.

33. O'Brien testified that she expects to receive a separate written request for any procedure she is asked to authorize because it would be a "nightmare" to review all the medical records she receives to determine if she should follow the requirements found in WCRP Rule 16. She explained that physicians frequently make treatment suggestions in medical reports, and that without receiving a separate written request for authorization, she would not even know if the claimants wanted the treatment being recommended.

34. O'Brien admitted that she received a report from Dr. Koval dated July 29, 2014 that stated Claimant "has undergone ketamine consultation and this treatment has indeed been recommended for her. We are awaiting news on authorization. She also received Drs. Orent and Koval's responses dated September 18. 2014.

35. O'Brien was aware that the report issued by Dr. Roth regarding the ketamine infusion is dated March 23, 2015.

36. It is essentially undisputed that Dr. Gesquiere is the provider of the ketamine infusion treatment. Dr. Gesquiere did not submit a written prior authorization request to the Respondent or third party administrator.

37. Respondent retained Dr. Henry Roth to perform an independent medical examination. Dr. Roth issued his report on March 23, 2015. He ultimately opined that there were insufficient clinical findings to diagnose the Claimant with CRPS.

38. Dr. Roth testified that if a patient has two positive diagnostic tests it is appropriate to diagnosis CRPS. Dr. Roth agreed that Claimant's positive thermogram and bone scan would technically fulfill the criteria to diagnosis Claimant with CRPS. Dr. Roth then testified that Claimant's positive results from the stellate ganglion blocks would also be supportive of her CRPS diagnosis. Dr. Roth agreed that all of Claimant's treating doctors have confirmed Claimant's CRPS diagnosis.

39. Dr. Roth testified that the thermogram is the most reliable test related to a CRPS diagnosis, and that Claimant's thermogram was indeed positive for CRPS.

40. Dr. Roth did not feel that Claimant's clinical presentation was indicative of CRPS. He recommended a repeat workup and evaluation of CRPS.

41. Regarding the ketamine infusion, Dr. Roth testified that his research indicated that recent findings have been encouraging, optimistic, and that it is becoming a more popular form of treatment. However, he also explained that ketamine is experimental because there are inadequate published studies plus it is outside the Colorado Workers' Compensation Medical Treatment Guidelines for that reason.

42. Dr. Roth testified that Claimant is "up against a wall" regarding her treatment options. Dr. Roth further testified that the ketamine infusion is "something that is out there that is getting some ballyhoo that they [Claimant's treating doctors] think is worth trying and she's willing to take the risk and I'm good with all that."

43. Dr. Roth then testified that the ketamine infusion is "not an unreasonable thing for her to pursue." Dr. Roth testified that the third party administrator can authorize "anything they want" even though the ketamine infusion is not found in the current workers' compensation medical treatment guidelines.

44. In his report Dr. Roth states, "Multiple medications have been tried and failed. Narcotics, muscle relaxers, neuropathics helped to relax her but did not relieve pain."

45. Although Dr. Roth raises questions about Claimant's CRPS diagnosis, he states in his report that "the most important evidence at this point in time is not whether the patient has CRPS, but what are the pros and cons and strength of the evidence for the ketamine infusion protocol."

46. Claimant has proven by a preponderance of the evidence that the ketamine infusion is reasonable, necessary, and related to her industrial injury. The medical record demonstrates that Claimant has exhausted all conservative treatment modalities related to her condition. Furthermore, the medical record is clear that each of Claimant's treating doctors (Drs. Koval, Orent, Gesquiere, and Hemler) all agree with the ketamine recommendation. The Judge credits the opinions of Claimant's treating physicians concerning Claimant's diagnosis as well as the reasonableness and necessity of the ketamine infusion.

47. Dr. Roth's opinions are not persuasive. Dr. Roth admitted that Claimant has met the diagnosis criteria for CRPS (positive bone scan, thermogram, and response to stellate block), but then suggested that she have another full workup for CRPS because he felt she lacked clinical findings. Furthermore, the extensive medical records generated by Claimant's treating doctors of over four years do not support Dr. Roth's observations of Claimant's symptoms or conclusions. Finally, in his testimony Dr. Roth states that the ketamine is not unreasonable for Claimant to pursue, and that if

her doctors believe it's worth trying and Claimant is willing to take the risks he is "all good with that." Dr. Roth's opinions rely heavily on the fact that ketamine is not included in the Colorado Medical Treatment Guidelines.

48. The ALJ finds that the Claimant's providers did not technically comply with Rule 16-9 because no provider made a separate written request for authorization of the ketamine infusions. However, multiple references to pending authorization for the ketamine treatment were found within the medical records that O'Brien possessed. Given that the ALJ has granted the Claimant's request for ketamine treatment on other grounds, the ALJ declines to reach a determination as to whether an adjuster should construe such comments or references as a Rule 16 request.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

7. While it is appropriate for the ALJ to consider the Medical Treatment Guidelines in determining whether certain medical treatment is reasonable, necessary and related to the claimant's injury, the ALJ is not required to solely rely on the Guidelines when making such determinations. Section 8-43-201(3), C.R.S.

8. As found, the Claimant has proven that the ketamine infusion treatment is reasonable, necessary and related to her industrial injury. The ALJ is persuaded by the significant documentation of CRPS by all of her treating providers and the objective testing performed to confirm the diagnosis of CRPS. Further, Drs. Koval, Orent, Hemler and Gesquiere all agree that the ketamine infusion treatment could greatly benefit the Claimant. Dr. Roth's opinions to the contrary are not as persuasive. The Claimant has considered the negative effects the ketamine may cause, but she nevertheless wishes to pursue the treatment. The overwhelming evidence supports her request.

9. WCRP 16 requires a Respondent to authorize or deny an authorization request within seven business days after its receipt. In this case, the ALJ cannot find that a proper authorization request for ketamine infusion treatment was made to the third party administrator. Thus, Respondent did not commit a violation of Rule 16 and no penalties, including Claimant's request for reasonable costs, shall be imposed.

ORDER

It is therefore ordered that:

1. The Claimant is entitled to the ketamine infusion treatment recommended by Dr. Michael Gesquiere.

2. The Claimant is not entitled to penalties or costs based on an alleged Rule 16 violation.

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: October 30, 2015

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak, 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 the minimally invasive sacroiliac fusion recommended by Dr. Tice is reasonable and necessary medical treatment related to claimant's industrial injury?

- Whether claimant has proven by a preponderance of the evidence that her workers' compensation claim should be reopened based on a change of condition pursuant to Section 8-43-303, C.R.S.?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her low back on January 9, 20120 while in the course and scope of her employment with respondent employer. Claimant testified at hearing that she was injured while pulling a pallet.

2. Claimant came under the care of Dr. Stagg for her work injury. Dr. Stagg placed claimant at maximum medical improvement ("MMI") for her work injury on November 18, 2010 and provided claimant with an 11% impairment rating. Respondents admitted liability for the impairment rating and admitted for post-MMI maintenance medical benefits by virtue of a December 16, 2010 final admission of liability ("FAL").

3. Claimant continued to receive post-MMI medical treatment through Dr. Lewis. Claimant underwent a left side sacroiliac ("SI") joint injection on April 2, 2013 as part of her maintenance medical treatment. The medical records indicate Dr. Lewis was evaluating to determine if claimant's left SI joint could be a pain generator responsible for her ongoing complaints. Claimant returned to Dr. Lewis on April 9, 2013 and reported a pain decrease following the SI injection. Claimant returned to Dr. Lewis on May 7, 2013 for a second injection. Dr. Lewis noted after the second injection, claimant reported initial relief and went home and fell asleep, which prevented her from being able to provide a strong degree of diagnostic response to the injection. Dr. Lewis further noted that claimant had not experienced substantial lasting therapeutic benefits from the injection.

4. Claimant underwent another diagnostic SI injection on June 7, 2013. Claimant reported a 100% decrease in her pain following the injection, but the pain relief did not last for a full 4-6 hours following the injection.

5. Claimant underwent a radiofrequency ablation neurotomy to the left SI joint on July 24, 2013 under the auspices of Dr. Lewis. Claimant returned to Dr. Lewis on August 29, 2013 and noted some improvement following the procedure, but also

complained of some right sided symptoms that were becoming stronger. Claimant returned to Dr. Lewis on September 26, 2013. Dr. Lewis noted claimant unfortunately denied any substantial improvement in her pain and noted claimant's frustration.

6. Dr. Lewis subsequently performed a left L5 transverse process injection on October 8, 2013. Claimant returned on October 15, 2013 and Dr. Lewis noted that through a course of interventional management, they were able to reduce her pain significantly, but claimant complained of a persisting discomfort in the left side of her lumbosacral junction following her last radiofrequency ablation.

7. Claimant underwent another procedure to her low back with Dr. Lewis on December 4, 2013 designed to treat her left sided SI pain that involved a left L5-S1 transverse process to sacral ala cooled radiofrequency ablation neurotomy as well as repeat denervation at the left L4 and L5 medial branch anatomy.

8. Claimant eventually underwent an L4 selective nerve block on July 17, 2014. Claimant initially reported 0/10 pain, but again developed a gradual return of her symptoms by July 31, 2014. Dr. Lewis offered claimant another transforaminal injection with a stronger dose of steroids to determine if they could further alleviate her symptoms.

9. Dr. Lewis referred claimant to Dr. Tice for evaluation in October 2014.

10. Dr. Tice evaluated claimant on October 14, 2014. Dr. Tice noted claimant was complaining of back problems and examination revealed claimant to be significantly tender over the left sacroiliac joint. Dr. Tice provided a diagnosis of left sacroiliac joint pain with questionable instability, lumbar spondylosis, left sciatica, and multiple sclerosis. Dr. Tice noted claimant's radiofrequency rhizotomy did not help much. Dr. Tice referred claimant for a magnetic resonance image ("MRI") of the pelvis. Claimant underwent the MRI on October 20, 2014 and showed findings of mild sacroiliitis bilaterally. Claimant was subsequently referred for a computed tomography ("CT") scan of the pelvis on December 4, 2014. The CT scan showed findings consisting with mild sacroiliitis.

11. Claimant returned to Dr. Tice on November 19, 2014. Dr. Tice reviewed the MRI scan and noted inflammation around the sacroiliac joint. Dr. Tice noted claimant had evidence of sacroiliac joint pain and indicated she could be a candidate for sacroiliac joint fusion.

12. Claimant returned to Dr. Tice on January 8, 2015. Dr. Tice noted claimant's ongoing problems with her lumbar spine and recommended a selective nerve root block at L5 to see if her symptoms would resolve. Dr. Tice again noted claimant may be a candidate for an SI joint fusion.

13. Dr. Tice subsequently recommended claimant be referred to Dr. Burnbaum for electrophysiological studies and an MRI scan of the lumbar spine. The MRI scan was performed on March 4, 2015 and demonstrated moderate degenerative

changes at the L4-5 level with no significant spinal stenosis or neural foraminal narrowing of the spine.

14. Claimant returned to Dr. Tice on April 7, 2015. Dr. Tice noted claimant's continued complaints and found claimant had failed conservative treatment. Dr. Tice recommended claimant consider a minimally invasive sacroiliac fusion.

15. Respondents obtained a records review independent medical examination ("IME") with Dr. Bernton on July 10, 2015. Dr. Bernton had previously examined claimant in connection with this case on April 14, 2011. Dr. Bernton issued a report dated July 10, 2015 that summarized claimant's medical records and noted that it was Dr. Bernton's opinion that the proposed sacroiliac joint fusion was not medically appropriate and unlikely to result in improvement in claimant's symptoms. Dr. Bernton noted that the medical treatment guidelines indicate that sacroiliac joint fusion may be indicated for stabilization of a traumatic severe disruption of the pelvic ring, but would not be recommended for mechanical low back pain.

16. Claimant testified at hearing in this matter that her current pain will range between 4 out of 10 and 10 out of 10. Claimant testified she has hot stabbing pain that is on the left side two inches below her belt line. Claimant testified that since being placed at MMI, her condition has progressively gotten worse and she now can not walk more than one block. Claimant testified she does not want surgery, but she has no option and would like to become more active.

17. Dr. Tice testified at hearing that he disagreed with Dr. Berton's opinion regarding the reasonableness and necessity of the proposed surgery. Dr. Tice testified he would have agreed with Dr. Tice a few years ago, but has seen better than expected results with the few times he has performed the surgery. Dr. Tice testified he expects claimant to get better, but no surgery is 100%. Dr. Tice noted on cross examination that according to the North American Spine Society, unilateral pain is one of the criteria listed for surgical considerations. Dr. Tice testified claimant complains of bilateral pain, but noted this was a difficult area as some people have bilateral pain that is improved with a unilateral sided fusion.

18. Dr. Bernton testified at hearing in this matter. Dr. Bernton testified that it was his opinion that claimant's surgery was not reasonable or necessary. Dr. Bernton noted that claimant's injury and initial treatment was not originally to the SI joint, but even if the SI joint was related to the injury, the fusion surgery is not indicated.

19. The ALJ credits the opinions expressed by Dr. Bernton and finds that claimant has failed to demonstrate that the surgery proposed by Dr. Tice involving a minimally invasive SI joint fusion is reasonable and necessary to cure and relieve claimant from the effects of her injury. The ALJ notes that claimant's complaints are bilateral in nature and finds claimant has failed to demonstrate that it is more probable than not that the proposed surgery would cure or relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

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

4. As found, claimant has failed to prove by a preponderance of the evidence that the proposed minimally invasive sacroiliac fusion is reasonable and necessary medical treatment to cure and relieve claimant from the effects of the work injury. As found, the opinions expressed by Dr. Bernton regarding the reasonableness and necessity of the proposed sacroiliac fusion are found to be credible and persuasive on this issue.

5. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d

222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that her condition has worsened since being placed at MMI. As found, the testimony of Dr. Bernton is found to be credible and persuasive regarding the issue of whether the surgery proposed by Dr. Tice would be reasonable and necessary to cure and relieve claimant from the effects of the work injury. As found, claimant has failed to prove by a preponderance of the evidence that her claim should be reopened based on a change of condition.

ORDER

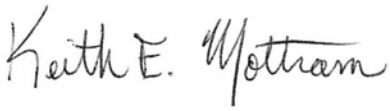
It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the proposed minimally invasive sacroiliac fusion is denied.

2. Claimant's request for an Order reopening her claim is denied.

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

DATED: October 9, 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 4-849-952-01

ISSUES

- Claimant's Petition to Reopen his claim;
- Claimant's request for reconsideration of PALJ Barbo's July 29, 2015 Prehearing Conference Order;
- Claimant's request for penalties for Employer's alleged failure to produce employment records; and
- Claimant's request for sanctions against Independent Medical Examiners and/or notification to the Division Independent Medical Examination Unit with regard to said practitioners.

❖ On October 27, 2015, Claimant filed a packet of documents with the Office of Administrative Courts. The cover sheet states, "I am attaching more evidence so that my case will be reopened and heard." To the extent that such filing could be construed as a motion to supplement the record, it is denied. Evidence closed at the September 24, 2015 hearing.

FINDINGS OF FACT

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

Petition to Reopen

1. On March 4, 2011, Claimant filed a worker's claim for compensation alleging a March 2, 2010 injury in the nature of an occupational disease, including annular tears and bulges in lumbar discs with pain radiating down his right leg into his foot with numbness. He alleged these injuries developed over time and were caused by his normal job duties of driving a shuttle bus, including sitting, bouncing, standing, bending, and lifting.

2. On May 13, 2015, Claimant filed an application for hearing on the issues of compensability, medical benefits, authorized provider, reasonably necessary, petition to reopen claim, temporary total benefits from March 2, 2010 to ongoing, permanent total disability benefits, and a number of alleged penalties. Claimant did not file a separate petition to reopen.

3. On May 24, 2011, hearing was held before Administrative Law Judge Margo W. Jones, on this claim and WC 4-820-488. On June 1, 2011, ALJ Jones issued a Summary Order finding and concluding that Claimant failed to establish that he

suffered an occupational disease or injury in the course and scope of his employment for the employer. No request for specific findings of fact and conclusions of law was filed, and the Summary Order became final.

4. At the hearing on September 24, 2015, the ALJ asked Claimant numerous times whether he was claiming his condition from the alleged March 2, 2010 occupational disease had worsened as the basis for his Petition to Reopen. Claimant repeatedly stated through the interpreter that his condition was the same during the entire period of time and that he did not claim that he was seeking to reopen his case based upon a change in condition or a worsened condition. Based upon this, the ALJ specifically finds and concludes Claimant does not claim a worsening or change in condition as a basis of his Petition to Reopen.

5. The ALJ has considered all the exhibits submitted by Claimant and admitted into evidence at the September 24, 2015 hearing, including medical records for this and other dates of alleged injury and other conditions, employment records, Employer's first report of injury, PALJ Barbo's prehearing conference order dated July 29, 2015, correspondence from Yvonne Lynah at the US Department of Labor, Judge Jones's summary order of June 1, 2011, a worker's claim for compensation and an employer's first report of injury for a date of injury of January 5, 2010.

6. The ALJ finds that none of the exhibits submitted into evidence persuasively establish Claimant's claim should be reopened on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition.

7. Based upon Claimant's statements and review of his submissions, the ALJ specifically finds and concludes Claimant does not seek to reopen his case on any basis that would support a granting of a Petition to Reopen. Therefore, Claimant has failed to meet his burden of proof to establish that his claim should be reopened.

PALJ Barbo's Prehearing Order and Claimant's Request for Penalties

8. Claimant seeks review of PALJ Barbo's Order denying Claimant's Motion to Compel Respondents to produce his employment records on the grounds he believes Employer has more records than have been provided to him. Claimant also seeks penalties against Employer for failure to provide him with additional records he believes exist. Claimant does not specify what additional records exist that have not been provided.

9. The ALJ has considered Claimant's request that PALJ Barbo's Order denying his Motion to Compel Respondents to produce his employment records be reversed. The ALJ finds PALJ Barbo's Order to be proper and affirms it. Claimant's representation that he thinks there are more records, without more, is insufficient to have PALJ Barbo or this ALJ issue an Order to Compel.

10. Claimant has failed to prove that an Order to Compel Respondents to produce employment records should be issued.

11. Claimant also has failed to prove he is entitled to penalties against Respondents for failure to produce employment records.

Sanctions Against Independent Medical Examiners

12. Claimant requests sanctions against the Independent Medical Examiners involved in this claim. Claimant specifically requested among other things that the ALJ revoke the licenses of the medical practitioners, have the medical practitioners jailed, and advise the Director of the Division Independent Medical Examination (DIME) Unit to be careful with regard to these healthcare providers.

13. Claimant has failed to prove any sanctions permitted by the Colorado Workers' Compensation Act are appropriate.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, et seq., C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

A workers' compensation 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).

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).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to 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 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).

Petition to Reopen

A workers' compensation "award" may be reopened within six years after the date of injury on the ground of fraud, an overpayment, an error, a mistake, or change in condition. Section 8-43-303(1), C.R.S. The party seeking to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S. The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo.App.1996).

Considering all the evidence, the ALJ concludes Claimant has failed to meet his burden of proof to establish that his claim should be reopened.

PALJ Barbo's Prehearing Order and Claimant's Request for Penalties

Section 8-43-304(1), C.R.S., provides for penalties against "[a]ny employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court . . .."

Considering all the evidence, the ALJ concludes Claimant has failed to prove he is entitled to penalties against Respondents for failure to produce employment records.

Sanctions Against Independent Medical Examiners

Claimant requests sanctions against Independent Medical Examiners, including, but not limited to, revoking the licenses of the medical practitioners, having the medical practitioners jailed, and advising the Director of the Division Independent Medical Examination (DIME) Unit to be careful with regard to these healthcare providers.

The Administrative Law Judge's jurisdiction is limited by the Colorado Worker's Compensation Act. In connection with workers' compensation hearings, administrative law judges are empowered to:

> (a) In the name of the division, issue subpoenas for witnesses and documentary evidence which shall be served in the same manner as subpoenas in the district court;
>
> (b) Administer oaths;

(c) Make evidentiary rulings;

(d) Limit or exclude cumulative or repetitive proof or examination;

(e) Upon written motion and for good cause shown, permit parties to engage in discovery; except that permission need not be sought if each party is represented by an attorney. The director or administrative law judge may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery.

(f) Upon written motion and for good cause shown, conduct prehearing conferences for the settlement or simplification of issues;

(g) Dispose of procedural requests upon written motion or on written briefs or oral arguments as determined appropriate;

(h) Control the course of the hearing and the conduct of persons in the hearing room;

(i) Upon written motion and for good cause shown, grant reasonable extensions of time for the taking of any action contained in this article;

(j) Upon good cause shown, adjourn any hearing to a later date for the taking of additional evidence;

(k) Issue orders;

(l) Appoint guardians ad litem, as appropriate, in matters involving dependents' claims, and assess the reasonable fees and costs, therefore, from one or more of the parties;

(m) Determine the competency of witnesses who testify in a workers' compensation hearing or proceeding and the competency of parties that have entered into settlement agreements pursuant to section 8-43-204. Such competency determinations shall only be for the purpose of the particular workers' compensation proceeding.

(n) Dismiss all issues in the case except as to resolved issues and except as to benefits already received, upon thirty days notice to all the parties, for failure to prosecute the case unless good cause is shown why such issues should not be dismissed. For purposes of this paragraph (n), it shall be deemed a failure to prosecute if there has been no activity by the parties in the case for a period of at least six months.

(o) Set aside all or any part of any fee for medical services rendered pursuant to articles 40 to 47 of this title if an administrative law judge determines after a hearing that, based upon a review of the medical

necessity and appropriateness of care provided pursuant to said articles, any such fee is excessive or that the treatment rendered was not necessary or appropriate under the circumstances. If all or part of any fee for medical services is set aside pursuant to this paragraph (o), the provider of any such services shall not contract with, bill, or charge the claimant for such fees and shall not attempt in any way to collect any such charges from the claimant. No fee for medical services shall be set aside pursuant to this paragraph (o) if the treatment was authorized in writing by the insurer or employer.

(p) Impose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title;

(q) Require repayment of overpayments.

The ALJ concludes she lacks subject matter jurisdiction to provide the remedies requested by Claimant, including revoking the licenses of the medical practitioners, having the medical practitioners jailed, and advising the Director of the Division Independent Medical Examination (DIME) Unit to be careful with regard to these healthcare providers.

ORDER

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

1. Claimant's petition to reopen is denied and dismissed.

2. Claimant's request that PALJ Barbo's Order denying Claimant's Motion to Compel be reversed is denied and dismissed.

3. Claimant's request for penalties based upon Respondents' alleged failure to produce employment records is denied and dismissed.

4. Claimant's request for sanctions against the Independent Medical Examiners is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman 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: October 28, 2015

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

#JVC305690D11V2v 1

ISSUES

The following issue was raised for consideration at hearing:

1. Whether the Respondents have overcome, by clear and convincing evidence, the DIME opinion of Dr. Joseph Morreale regarding the Claimant's status related to maximum medical improvement ("MMI").

FINDINGS OF FACT

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

1. The Claimant sustained a work injury to his low back on August 24, 2011 while employed as a tree trimmer by Employer. The Claimant experienced lumbar pain while twisting as he was exiting his vehicle. After initial conservative treatment did not resolve the Claimant's issues, the Claimant underwent an L5-S1 discectomy and laminectomy.

2. In follow up after his surgery, the Claimant saw Dr. Kevin O'Connell, who took over care as Claimant's authorized treating physician. Due to a lack of progress over an extended time, Dr. O'Connell referred the Claimant back to Dr. Benz for re-evaluation. At that time, Dr. Benz advised the Claimant that if his pain were intolerable, his options were artificial disc replacement or fusion.

3. Prior to surgery, Dr. Benz suggested bilateral facet injections which were performed by Dr. Rebekah Martin on March 27, 2013. On April 19, 2013, the Claimant saw Dr. Benz for reevaluation. The Claimant reported no relief from the injections performed by Dr. Martin. Dr. Benz also acknowledged Dr. Coester's opinion from March 11, 2013 that the Claimant's chances for improvement with surgery were around 50% and there was a substantial chance the surgery could make the Claimant's symptoms worse. Dr. Benz agreed with Dr. Coester's assessment but advised the Claimant that if his symptoms were intolerable, he offered surgical intervention. Dr. Benz's projected chance of success is 50-60% chance of making substantial improvement in the Claimant's pain with a fusion, slightly higher with disc replacement. Based on discussion that Dr. Benz had with the Claimant at that visit, Dr. Benz noted that the Claimant wanted to pursue surgery, specifically an artificial disc replacement (Claimant's Exhibit 2, p. 21).

4. The Claimant saw Dr. Brian Reiss on May 29, 2013 for an independent medical evaluation. Dr. Reiss opined that he did not believe any surgical intervention would help the Claimant's leg pain and he felt it was questionable whether or not the proposed procedure would help with the back pain. Dr. Reiss recommended an

intensive core strengthening program (Respondents' Exhibit D, pp. 37-42).

5. After a previous hearing in this matter, an Order dated December 17, 2013 was issued. Crediting the opinions of Dr. Coester and Dr. Reiss, it was found that, at that juncture, the Claimant had not established that the proposed artificial disc replacement surgery was reasonably necessary to cure and relieve the Claimant from the effects of his August 24, 2011 work injury. Relying on the medical records and the opinion of Dr. Reiss, it was held that the Claimant had not yet undergone a full course of intensive core strengthening. It was ordered that, prior to further consideration of the surgical intervention recommended by Dr. Benz, the Claimant was to undergo and complete sufficient physical therapy and active modalities unless, after commencing an active exercise regime and physical therapy and adequately addressing increased pain complaints, his authorized treating physician(s) determine that continued participation in such modalities were detrimental to the Claimant (Respondents' Exhibit C).

6. On January 16, 2014, the Claimant followed up with Dr. O'Connell who noted that the Claimant received approval to begin a water therapy program to improve flexibility prior to launching a MedX physical therapy program. Dr. O'Connell noted that the Claimant was evaluated on January 15, 2014 by the physical therapist that made this recommendation and the Claimant would begin water therapy the following week. At this point, the Claimant's pain level was reported 5/10 and work restrictions were continued (Claimant's Exhibit 3, pp. 77-79; Respondents' Exhibit F, pp. 55-57).

7. On February 24, 2014, Dr. O'Connell noted that the Claimant had been going to warm water pool therapy with slight improvement. Dr. O'Connell agreed with the physical therapist's recommendation for increasing the physical therapy prescription to include pool therapy 2 times per week to complement his other therapy, stretching and strengthening (Claimant's Exhibit 3, pp. 81-84; Respondents' Exhibit F, pp. 58-62).

8. As of the Claimant's March 24, 2014 office visit with Dr. O'Connell, the Claimant reported minimal change in symptoms as far as pain is concerned. The Claimant reported that the warm water therapy followed by PT felt good and was beneficial in improving his range of motion. As the Claimant's improvement with physical therapy was slow, Dr. O'Connell recommended gravity lumbar traction and explained the therapy modality to the Claimant (Claimant's Exhibit 3, pp. 85-88; Respondents' Exhibit F, pp. 63-66).

9. On June 17, 2014, the Claimant reported to Dr. O'Connell that the physical therapy has been helpful in providing partial relief from low back pain and there was been advancement with the Claimant's lumbar range of motion. The Claimant had continued with water therapy and acupuncture with electrical stimulation. He also increased his home traction treatment from 1 to 2 times per day on an every other day basis. Dr. O'Connell also talked about the MedX spine program with the Claimant again but advised that he did not think the Claimant was likely to be a suitable candidate as the advancement of his recovery with therapy had been limited. Dr. O'Connell opined

that the Claimant's low back would not stand up to the vigorous intense lumbar spine rehabilitation due to the resistance and repetition required by the program. Dr. O'Connell did not anticipate that the Claimant would be able return to a high level of heavy lifting or repetitive bending or stooping. Dr. O'Connell instead requested lumbar spine range of motion measurements from the therapist for determination of the Claimant's impairment (Claimant's Exhibit 3, pp. 89-92; Respondents' Exhibit 67-70).

10. On July 14, 2014, Dr. O'Connell noted the Claimant completed his physical therapy and made progress in reducing his pain and increasing his range of motion. The Claimant reported that he was interested in progressing to the MedX spine program to see if he could further improve ROM and strength. Dr. O'Connell continued to note apprehension about the Claimant's ability to engage in a vigorous program such as MedX. Dr. O'Connell also advised the Claimant that he did not believe the Claimant was a candidate for surgical intervention at this point. Dr. O'Connell did recommend proceeding to a spine strengthening and work conditioning program with his current physical therapist (Respondents' Exhibit F, pp. 73-75).

11. The Claimant brought up the question of whether he could be a candidate for the MedX spine program with Dr. O'Connell again on September 2, 2014 and Dr. O'Connell again advised that he is not going to recommend it because it is a vigorous program with the expectation of a high level of physical demand. After discussing it with the Claimant's physical therapist, Dr. O'Connell felt that the Claimant could continue to advance his physical activity but at a lower level than required by the MedX program. Dr. O'Connell advised the Claimant that his current PT regiment was adequate for the Claimant for strengthening, conditioning and work simulation for the stated goals of lifting 40 lbs. infrequently and 25 lbs. on a more frequent basis. Dr. O'Connell noted that he expected the Claimant to be at MMI in about 4 more weeks (Claimant's Exhibit 3, pp. 93-96; Respondents' Exhibit F, pp. 78-81).

12. On October 14, 2014, Dr. O'Connell noted that the Claimant reported that his back pain was stable and rated his pain at 3/10. The pain intermittently radiates into the Claimant's left leg, but there is no weakness. The Claimant advises he continued to use a home lumbar traction unit and perform his home exercise stretches daily. He completed his physical therapy conditioning program and a lift test was done on October 7, 2014 and he was able to lift and carry 25 pounds at waist level for 10 repetitions. He could demonstrate a 40 pound lift at waist level for 1 repetition but it caused low back discomfort. He could not lift from the floor or overhead. The Claimant's functional rating did improve from the onset of the conditioning program (Respondents' Exhibit F, p. 84). Dr. O'Connell noted that the Claimant had previously received lumbar ESIs and bilateral facet injections with no significant improvement. He also noted that Dr. Benz had recommended 2 surgical options (artificial disk replacement or fusion), but that Dr. Hans Coester provided a second opinion that these surgeries were not likely to reduce the Claimant's pain. He noted an IME physician, Dr. Reiss, recommended a lumbar spine conditioning/core strengthening program prior to considering surgical options. Dr. O'Connell noted that the Claimant made gradual progress but eventually

plateaued in his physical therapy program (Respondents' Exhibit F, p. 85). Dr. O'Connell also noted that lumbar range of motion measurements from July 10, 2014 did not change at this October 14, 2014 exam. Dr. O'Connell assigned a 10% impairment for the Claimant's specific disorder of the lumbar spine and a 9% impairment for lumbar spine range of motion deficits for a combined impairment rating of 18%. Dr. O'Connell provided permanent restrictions of lifting a maximum of 40 pounds infrequently and 25 pounds frequently. Dr. O'Connell provided a carrying restriction of 25 pounds and pushing and pulling restrictions of 40 pounds. He noted the Claimant had limited bending ability restricted to 2 hours and he could walk, stand or sit for 8 hours but if seated at work, needed to change positions every 15 minutes and he was limited to 1 hour for crawling or kneeling and 2 hours for partial squatting or climbing stairs. Generally, Dr. O'Connell opined the Claimant was capable of performing work involving light to moderate physical activity. Dr. O'Connell discharged the Claimant from care and placed him at MMI (Respondents' Exhibit F, pp. 86-87).

13. The Respondents filed a Final Admission of Liability on November 4, 2014 admitting for the 18% whole person impairment and for post-MMI treatment by the ATP that is reasonable, necessary and related to the injury. Dr. O'Connell's October 14, 2014 report was provided as the basis for the admission (Respondents' Exhibit B).

14. The Claimant sought a Division IME and this was performed by Dr. Joseph Morreale on March 2, 2015 and he issued a written report (Claimant's Exhibit 1; Respondents' Exhibit E). After examination, Dr. Morreale provided a provisional impairment rating of 22% whole person, including a 12% for range of motion deficits, a 10% impairment rating for specific disorder and a 1% neurologic rating. However, Dr. Morreale opined that the Claimant was not at MMI. He opined that the Claimant's sacroiliac joint is problematic and may be the cause of pseudo sciatica which is why the Claimant failed to have significant relief from any procedures so far. Dr. Morreale recommended a trial of injections in the Claimant's left sacroiliac joint and more physical therapy with the stress on the Claimant's sacroiliac joint. He opined that if this failed, Dr. Benz surgical recommendations should be reconsidered after obtaining new imaging studies (Claimant's Exhibit 1, p. 5; Respondents' Exhibit E, p. 44).

15. The Claimant saw Dr. Reiss for a repeat IME on May 6, 2015. In reviewing the medical notes of Dr. O'Connell since Dr. Reiss' prior IME in 2013, Dr. Reiss makes several critical comments with regard to Dr. O'Connell's approach to the Claimant's physical therapy referrals (Respondents' Exhibit D). Dr. Reiss disagreed with Dr. O'Connell's June 17, 2014 opinion that the Claimant would not be a candidate for the MedX spine program. Dr. Reiss opined that the Claimant needed a core strengthening, stretching and aerobic conditioning program and noted passive modalities should only be used as an adjunct to this, not as the primary treatment (Respondents' Exhibit D, p. 32). Dr. Reiss made several observations that Dr. O'Connell was not recommending an appropriate core strengthening program and opined that traction and stretching were not the answer to the Claimant's back complaints. Rather, Dr. Reiss opined that a core strengthening program and a psychological evaluation, both of which could be carried

out as maintenance care, are the appropriate rehabilitation measures for the Claimant. Dr. Reiss also noted, "there is the possibility that his impairment rating could change, decrease, after making progress in his rehabilitation program" (Respondents' Exhibit D, p. 33). With regard to the DIME report of Dr. Morreale, Dr. Reiss opined that, "it is not very likely that [the Claimant's] sacroiliac joint is the source of his pain." Rather, Dr. Reiss opined that the MRI findings were typical of degenerative change associated with the previous injury and surgical intervention. Dr. Reiss found that the Claimant's subjective complaints were out of proportion to his objective findings and did not detect any significant sacroiliac irritation. Dr. Reiss concludes that the Claimant "has simple lower back pain most likely perpetuated by his deconditioned state" (Respondents' Exhibit D, p. 33). Dr. Reiss again opines that "all appropriate conservative care be completed prior to considering surgical intervention and in this case that has not been accomplished." He points out that a pain generator must also be clearly defined and that the likelihood of improvement of his condition be greater with surgical intervention than with continued nonsurgical care. However, Dr. Reiss argued that the opposite is true in the Claimant's case. Ultimately, in his written report, Dr. Reiss opined that the Claimant was at MMI and any additional treatment can be considered maintenance. He did opine that the ongoing back pain was probably still related to the Claimant's work injury along with his deconditioned state and he disagreed that it was sacroiliitis (Respondents' Exhibit D, p. 34).

16. At the hearing, Dr. Reiss testified as an expert in orthopedics with a subspecialty in spine. Dr. Reiss testified that the DIME opinion of Dr. Morreale is incorrect. Specifically, he opined that the SI is unlikely to be a pain generator for the Claimant and noted that neither Dr. Coester nor Dr. Benz had identified the sacroiliac joint as an issue. Dr. Reiss testified that his physical examination of the Claimant did not reproduce pain at the SI joint. He also noted that it is impossible to isolate the SI joint, therefore Dr. Morreale was speculating about SI joint pain. Dr. Reiss testified that the Claimant is not supporting his back in a way that protects it; he needs a strong core to share the load. Dr. Reiss noted that when the Claimant did participate in an exercise program he did improve, but he still hasn't participated in an aggressive core strengthening program. Dr. Reiss continues to opine that surgery is not a good option in this case because the pain generator has not been identified and the Claimant has no instability, only degeneration. Moreover, Dr. Reiss finds the Claimant has unrealistic expectations from surgery and he still has not participated in an appropriate core strengthening program, so conservative care has not been completed. Finally, the Claimant has not undergone a psychological evaluation. Dr. Reiss ultimately opines that the Claimant now needs only maintenance care to include a more aggressive exercise program. On cross-examination, Dr. Reiss agreed that the Claimant would likely improve his level of functioning if he continued with a core strengthening program. Dr. Reiss agreed that the Claimant has had no new diagnostic testing since 2013 to determine if the Claimant is a candidate for surgical intervention. However, as for the diagnostics recommended by Dr. Morreale, Dr. Reiss reiterated that no new imaging or diagnostics is necessary since it is not likely an MRI would show anything new. If the symptoms are unchanged, there is no need for new imaging, per Dr. Reiss.

17. The Claimant testified at the hearing that he did engage in physical therapy and exercise since the time of his first hearing. He testified that when he was in the water therapy and during physical therapy, he experienced some relief, but it was not long term, it was only temporary. He also used a traction unit two times per week. The whole time that he was in physical therapy the Claimant tried to do the extreme core strengthening program but he was not physically able to do this. The Claimant testified that his current symptoms are a sharp low back pain with spasms and leg pain when he steps or lifts his foot. The Claimant felt the evaluation with the DIME physician was thorough and he would like to follow up with the imaging and further consideration for Dr. Benz' surgery recommendation to see if this is still a treatment option.

CONCLUSIONS OF LAW

Generally

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

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

Burden of Proof for Challenging an Opinion on MMI Rendered by a DIME Physician

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME

which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

The Claimant sustained a low back injury on August 24, 2011 and initial conservative treatment did not resolve his pain. He then underwent and L5-S1 discectomy and laminectomy surgery performed by Dr. Benz. The results of the surgery did not meet the Claimant's expectations in terms of pain relief and after that, little progress was made towards pain relief and increased function. The Claimant's authorized treating physician Dr. O'Connell referred the Claimant back to Dr. Benz for reevaluation and Dr. Benz offered two surgical options. The Claimant was also evaluated by Dr. Coester who opined that the Claimant's chances for improvement with surgery were around 50% and there was a substantial chance that the surgery would

make the Claimant's symptoms worse. Dr. Benz generally agreed with Dr. Coester's assessment but advised the Claimant if his symptoms were "intolerable" he offered the surgical option. Dr. Reiss then performed an IME and opined that surgical intervention would not help the Claimant's leg pain and it was questionable whether the surgery would help with the back pain. Instead, he recommended an intensive core strengthening program.

Relying on the medical records and the opinion of Dr. Reiss, it was held that the Claimant had not yet undergone a full course of intensive core strengthening. It was previously ordered that, prior to further consideration of the surgical intervention recommended by Dr. Benz, the Claimant was to undergo and complete sufficient physical therapy and active modalities unless, after commencing an active exercise regime and physical therapy and adequately addressing increased pain complaints, his authorized treating physician(s) determine that continued participation in such modalities were detrimental to the Claimant. The Claimant continued to treat with Dr. O'Connell throughout 2014. A MedX physical therapy program, the type of intensive core strengthening program recommended by Dr. Reiss, was considered. However, Dr. O'Connell repeatedly opined that the Claimant was not a suitable candidate for this type of program as it was too vigorous for the Claimant's physical state and the physical demand was too high. The Claimant was directed to a water therapy and physical therapy regimen coupled with traction and passive modalities. Upon completion of this therapy, Dr. O'Connell noted that the Claimant had slowly improved in terms of pain levels and functioning and then stabilized or plateaued. Dr. O'Connell still did not believe the Claimant was a candidate for the more aggressive MedX program. When he placed the Claimant at MMI, Dr. O'Connell noted the Claimant's pain complaint was 3 out of 10. Dr. Reiss testified that this level of pain is not consistent with the Medical Treatment Guidelines' provisions for surgery. Dr. O'Connell discharged the Claimant from care as of October 14, 2014 and provided an impairment rating.

The Claimant then proceeded to a DIME with Dr. Morreale, who opined that the Claimant was not at MMI. He opined that the Claimant's sacroiliac joint is problematic and may be the cause of pseudo sciatica which is why the Claimant failed to have significant relief from any procedures so far. Dr. Morreale recommended a trial of injections in the Claimant's left sacroiliac joint and more physical therapy with the stress on the Claimant's sacroiliac joint. Dr. Morreale's written report does not go into much detail about how he came to this conclusion, which was not previously raised by any treating or evaluating physician. Dr. Morreale opined that if the trial of SI injections failed, Dr. Benz surgical recommendations should be reconsidered after obtaining new imaging studies.

After this, the Claimant saw Dr. Reiss for a repeat IME on May 6, 2015. In reviewing the medical notes of Dr. O'Connell since Dr. Reiss' prior IME in 2013, Dr. Reiss makes several critical comments with regard to Dr. O'Connell's approach to the Claimant's physical therapy referrals, specifically disagreeing with Dr. O'Connell's June 17, 2014 opinion that the Claimant would not be a candidate for the MedX spine program. Dr. Reiss continued to opine that the Claimant needed a core strengthening,

stretching and aerobic conditioning program and noted passive modalities should only be used as an adjunct to this, not as the primary treatment. With regard to the DIME report of Dr. Morreale, Dr. Reiss opined that," it is not very likely that [the Claimant's] sacroiliac joint is the source of his pain." Rather, Dr. Reiss opined that the MRI findings were typical of degenerative change associated with the previous injury and surgical intervention. Dr. Reiss found that the Claimant's subjective complaints were out of proportion to his objective findings and did not detect any significant sacroiliac irritation. Dr. Reiss concluded that the Claimant "has simple lower back pain most likely perpetuated by his deconditioned state." Dr. Reiss also pointed out that for the Claimant to be a surgical candidate, a pain generator must also be clearly defined and that the likelihood of improvement of the Claimant's condition be greater with surgical intervention than with continued nonsurgical care. However, Dr. Reiss argued that the opposite is true in the Claimant's case. Ultimately, in his written report, Dr. Reiss opined that the Claimant was at MMI and any additional treatment would be considered maintenance.

At the hearing, Dr. Reiss testified that the DIME opinion of Dr. Morreale is incorrect. Specifically, he opined that the SI is unlikely to be a pain generator for the Claimant and noted that neither Dr. Coester nor Dr. Benz had identified the sacroiliac joint as an issue. Dr. Reiss testified that his physical examination of the Claimant did not reproduce pain at the SI joint. He also noted that it is impossible to isolate the SI joint, therefore Dr. Morreale was speculating about SI joint pain. Dr. Reiss testified that the Claimant is not supporting his back in a way that protects it; he needs a strong core to share the load. Dr. Reiss noted that when the Claimant did participate in an exercise program he did improve, but he still hasn't participated in an aggressive core strengthening program. Dr. Reiss continues to opine that surgery is not a good option in this case because the pain generator has not been identified and the Claimant has no instability, only degeneration. Moreover, Dr. Reiss finds the Claimant has unrealistic expectations from surgery and he still has not participated in an appropriate core strengthening program, so conservative care has not been completed. Finally, the Claimant has not undergone a psychological evaluation. Dr. Reiss ultimately opines that the Claimant now needs only maintenance care which should include a more aggressive exercise program. Dr. Reiss agreed that the Claimant has had no new diagnostic testing since 2013 to determine if the Claimant is a candidate for surgical intervention. However, as for the diagnostics recommended by Dr. Morreale, Dr. Reiss reiterated that no new imaging or diagnostics is necessary since it is not likely an MRI would show anything new. If the symptoms are unchanged, there is no need for new imaging, per Dr. Reiss.

The Claimant testified at the hearing that he did engage in physical therapy and exercise since the time of his first hearing. He testified that when he was in the water therapy and during physical therapy, he experienced some relief, but it was not long term, it was only temporary. He also used a traction unit two times per week. The Claimant testified that the whole time that he was in physical therapy, he tried to do the extreme core strengthening program, but he was not physically able to do this. The

Claimant testified that his current symptoms are a sharp low back pain with spasms and leg pain when he steps or lifts his foot.

The ALJ is persuaded, in large part by the opinion of Dr. Reiss, and supported by the finding of Dr. O'Connell, that the Claimant has reached maximum medical improvement. There are no recommendations which would be reasonably expected to cure and relieve the claimant's condition. Rather, the recommended continued therapy would be considered maintenance care. While the Claimant may benefit from a continuing exercise program, if he is not able to progress to a more aggressive core strengthening program and his pain level has stabilized at about 3/10, at this point, the additional treatment would be maintenance. The Claimant himself testified that he attempted the extreme core strengthening exercises but was unable to do them, so it is not likely that he will progress to a more aggressive physical therapy program.

The opinions of Dr. Reiss and Dr. O'Connell are more credible and persuasive concerning the issue of maximum medical improvement than those of Dr. Morreale. The ALJ is persuaded that Dr. Morreale's opinions are incorrect given the protracted history of this case and the Claimant's delayed recovery, coupled with the likelihood that the diagnoses offered by Dr. Morreale are likely incorrect. Moreover, the Claimant's back pain had decreased with the conservative care to a reported 3 out of 10 level at MMI. This would not generally be considered "intolerable" pain to justify surgery that Dr. Benz previously recommended. The opinions of Dr. O'Connell, Dr. Benz, Dr. Coester and Dr. Reiss, when taken in the context of the entire medical record in this case, establish that it is highly probable and free from substantial and serious doubt that Dr. Morreale is incorrect in his diagnosis of Claimant's condition and his opinion regarding maximum medical improvement in this case.

Ultimately, the lack of explanation as to his findings and examination results, and the lack of attention to detail in his report, cast serious doubt on the opinions expressed by Dr. Morreale, especially in light of the contrary and persuasive opinion of Dr. Reiss. Respondents have therefore overcome the opinion of Dr. Morreale by clear and convincing evidence. The Claimant remains at maximum medical improvement as of October 14, 2014.

ORDER

It is therefore ordered that:

1. The Respondents have established that it is highly probable and free from serious or substantial doubt that the opinion of the DIME physician, Dr. Morreale, is incorrect. Respondents have overcome the DIME opinion of Dr. Joseph Morreale regarding the Claimant's status related to maximum medical improvement ("MMI") by clear and convincing evidence.

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

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

DATED: October 20, 2015

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

ISSUES

1. Whether the issue of mileage reimbursement is closed pursuant to the Final Admission of Liability dated April 14, 2014.

2. Whether the Administrative Law Judge has jurisdiction to determine the issue of mileage from August 12, 2012 through April 4, 2014.

3. Has claimant proven by a preponderance of the evidence that she is entitled to mileage reimbursement from August 12, 2012 through April 4, 2014?

4. Whether the issue of mileage reimbursement from August 12, 2012 through April 4, 2014 was ripe at the time the claimant's Application for Hearing was filed on April 20, 2015.

FINDINGS OF FACT

1. Respondent filed a Final Admission of Liability on April 8, 2014. (Exhibit A)

2. Claimant filed an objection to the Final Admission of Liability and Notice and Proposal for a Division IME on April 14, 2014. (Exhibit B)

3. Claimant submitted a request for mileage reimbursement for 8,652 miles for dates ranging from August 12, 2012 through May 9, 2014 on May 12, 2014. (Exhibit C)

4. Adjuster, Matthew Knipple, responded on May 13, 2014 asking Claimant to provide the addresses of her appointments. (Exhibit D)

5. Claimant did not respond to the May 13, 2014 letter from the adjuster.

6. On May 19, 2014, adjuster Matthew Knipple sent a letter to claimant's attorney requesting claimant provide the addresses for reimbursement to verify mileage stated. (Exhibit E)

7. Claimant's attorney did not respond to the May 19, 2014 letter.

8. On July 14, 2014, claimant's attorney's paralegal emailed respondent's attorney's paralegal requesting the status of the mileage reimbursement.

9. On July 22, 2014, respondent's attorney's paralegal emailed claimant's attorney's paralegal indicating the adjuster again requested the addresses of the appointments to verify mileage.

10. Claimant did not respond to the July 22, 2014 request for additional information.

11. On August 5, 2014, claimant formally withdrew her Notice and proposal for the DIME. (Exhibit F).

12. On December 1, 2014, claimant resubmitted her mileage request and added mileage from May 27, 2014 through December 1, 2014. (Exhibit G).

13. Respondent replied on December 30, 2014 denying liability for mileage from August 12, 2012 through April 4, 2014. Respondent paid mileage from April 11, 2014 forward. (Exhibit H)

14. Claimant filed an Application for Hearing on April 20, 2015 endorsing the issue of mileage reimbursement. (Exhibit I)

15. Respondent filed a Response on April 23, 2015 endorsing the additional issues of case being closed, ripe issues, jurisdiction, attorney fees. (Exhibit J).

16. Prehearing Conference Order. (Exhibit K)

17. The parties agree that the issue of attorney fees will be reserved for future determination.

18. The parties agree to submit position statements no later than October 5, 2015.

CONCLUSIONS OF LAW

1. C.R.S. 8-43-203(2)(b)(II)(A) provides in part:

> If an independent medical examination is requested pursuant to §8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are

ripe for hearing until the Division's Independent Medical Examination process is terminated for any reason.

2. The issue of mileage reimbursement for mileage incurred between August 12, 2012 and April 4, 2014 was ripe for hearing when the Final Admission of Liability was filed on April 8, 2014. All of the mileage requested was incurred prior to filing of the Final Admission of Liability. Since claimant timely filed a Notice and Proposal for DIME, the claimant was not required to file an Application for Hearing on ripe issues during the time the DIME was pending. The claimant did send a written request to the adjuster for reimbursement of mileage and the adjuster appropriately asked for additional information to verify the mileage. Claimant did not respond to the adjuster's request for additional information. The claimant formally withdrew the Notice and Proposal for DIME on August 5, 2014. At the latest, claimant had thirty (30) days after withdrawing her Notice and Proposal for DIME or until September 4, 2014 to file an Application for Hearing on all ripe issues that resulted from the filing of the Final Admission of Liability in April of 2014. Claimant did not do so.

3. The plain language of the statute expressly provides that the case will be automatically closed as to the issues admitted in the Final Admission of Liability if the claimant does not, within thirty (30) days after date of the Final Admission of Liability, contest the Final Admission of Liability in writing and request a hearing on any disputed issues that are ripe for hearing. When claimant terminated the DIME process on August 5, 2014, claimant's obligation to file an Application for Hearing within thirty (30) days, on any disputed issues admitted the April 8, 2014 Final Admission of Liability arose. Claimant did not file the Application for Hearing until April 15, 2015.

4. Mileage expenses to and from authorized medical treatment are a compensable medical benefit. *Sigman Meat Company v. Industrial Claim Appeals Office,* 761 P.2d 265 (Colo. App. 1998). In *Newbrey v. Valley Excavating, Inc.,* (ICAO January 18, 2006), the Industrial Claim Appeals Office held that where a claimant failed to file the Application for Hearing within thirty (30) days of the Final Admission of Liability, "the admitted issue" of medical benefits and specifically, mileage, closed.

5. Subject matter jurisdiction relates to the power or authority of the court to deal with a particular case. The Administrative Law Judge's authority is strictly statutory and without subject matter jurisdiction, the Administrative Law Judge has no authority to act. *Reed v. Industrial Claim Appeals Office,* 13 P.3d 810 (Colo. App. 2000). Subject matter jurisdiction is created in and limited by the Workers' Compensation Act. *Compton v. Industrial Claim Appeals Office,* 13 P.3d 844 (Colo. App. 2000). When

claimant terminated the DIME process, claimant had thirty (30) days to file an Application for Hearing all ripe issues as set forth in C.R.S. 8-43-203(2)(b)(II)(A).

6. Ripeness tests whether an issue is real, immediate, and fit for adjudication. There was no legal impediment to litigating the mileage issue at the time the Final Admission of Liability was filed. The only reason that claimant was not required to file an Application for Hearing within thirty (30) days of the April 8, 2014 Final Admission is that claimant requested a DIME. When claimant withdrew the request for a DIME, claimant had an obligation to file an Application for Hearing on any ripe issues. Claimant did not do so.

7. The phrase "ripe for hearing" is not defined by statute. The statutory language in §8-43-203(2)(b)(2) was part of a comprehensive bill which established procedures and time limitations for the selection of a Division Independent Medical Examination. An issue is ripe for hearing if the issue is addressed in the Final Admission of Liability and the legal prerequisites to adjudication of the issue are complete. The issue of ripeness concerns whether or not an issue is subject to adjudication under the statute, not whether a party is prepared to litigate the issue. In *Chavez v. Cargill,* W.C. No. 4-421-748, (ICAO November 1, 2002), the ICAO held that where a claimant filed an Application for Hearing on the issue of average weekly wage outside of the thirty (30) days after the Final Admission of Liability, that the issue of average weekly wage was not ripe because there was no legal impediment to adjudication of the average weekly wage at the time the Final Admission of Liability was filed. The ICAO went on to say that the ALJ was without power to reopen the closed issue except as provided under §8-43-303.

8. The ALJ concludes that the respondent has established by a preponderance of the evidence that the issue of reimbursement for mileage incurred from August 12, 2012 through April 4, 2014 was closed by operation of law 30-days subsequent to the Notice of Withdrawal and acceptance of the Final Admission of Liability, dated August 5, 2014.

9. The ALJ concludes that the ALJ lacks jurisdiction to determine the issue of mileage from August 12, 2012 through April 4, 2014; and, thus makes no determination thereof.

10. The ALJ concludes that the issue of mileage from August 12, 2012 through April 4, 2014, which was endorsed as an issue on the claimant's Application for Hearing and Notice to Set dated April 20, 2015 was not ripe at the time of the filing of the application.

ORDER

It is therefore ordered that:

1. The claimant's claim for mileage from August 12, 2012 through April 4, 2014 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: October 29, 2015

/s/ original signed by:

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for left shoulder arthroscopic rotator cuff surgery by David Schneider, M.D. is reasonable, necessary and causally related to his March 14, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant was employed as a Food Service Worker for Employer. On March 14, 2013 he was carrying two cans of meatballs in each hand when his left knee locked and he fell onto his right knee. While still holding the cans of meatballs he then landed on his left elbow.

2. After Claimant visited an emergency room, he was directed to Concentra Medical Centers for treatment. On March 18, 2013 Claimant was diagnosed with a left knee contusion. Upon examination, Claimant's left elbow demonstrated full range of motion. Claimant did not report any left shoulder pain.

3. Claimant returned to Concentra for medical treatment but did not report any left shoulder symptoms. However, on May 7, 2013 Claimant reported left shoulder pain. When PA-C Nickolas Curcija questioned Claimant about the cause of the pain, he reported his left shoulder began hurting the previous week when he was lifting a 35 pound container of oil. PA-C Curcija advised Claimant that he needed to report a new Workers' Compensation claim. However, Claimant reported that his left shoulder had been symptomatic since his March 14, 2013 accident but he had expected the pain to resolve. PA-C Curcija recorded that Claimant had not previously mentioned left shoulder pain either verbally or through a pain diagram.

4. After additional conservative treatment through Concentra Claimant obtained a change of physician to Caroline Gellrick, M.D. During his initial evaluation with Dr. Gellrick on July 25, 2013 Claimant reported that he had been experiencing left shoulder pain since his March 14, 2013 accident but Concentra had refused to treat his symptoms. Dr. Gellrick recorded that Claimant had positive impingement signs and questioned whether he suffered from rotator cuff pathology. She diagnosed Claimant with a left shoulder strain and contusion from the jolt of falling.

5. Claimant continued to receive medical treatment from Dr. Gellrick. On August 28, 2013 Dr. Gellrick noted that Claimant's pain complaints had not resolved. Dr. Gellrick thus requested a second opinion regarding Claimant's knee and left shoulder conditions from Orthopedic Surgeon David Schneider, M.D.

6. On October 11, 2013 Claimant visited Dr. Schneider for an examination. Dr. Schneider remarked that Claimant's mechanism of injury was consistent with a left shoulder injury. He suspected a possible SLAP tear and requested an MRI. Dr. Schneider reported that Claimant suffered pain, weakness and instability in his left shoulder.

7. On October 28, 2013 Claimant underwent a left shoulder MRI. The MRI revealed roughening of the articular surface of the supraspinatus tendon as well as minor signal changes within the tendon. The MRI findings were consistent with tendinopathy.

8. On October 30, 2013 Claimant returned to Dr. Schneider for an examination. Dr. Schneider remarked that the MRI revealed an intact rotator cuff and mild supraspinatus tendinopathy. He recommended conservative left shoulder treatment. Dr. Schneider noted that "I doubt he will need surgical intervention at any time on this shoulder."

9. On November 13, 2013 Claimant returned to Dr. Gellrick for an examination. She reported that Claimant's left shoulder MRI revealed an intact rotator cuff with supraspinatus tendinopathy, mild hypertrophic AC joint arthropathy and abnormal acromial configuration. Dr. Gellrick commented that Dr. Schneider had recommended conservative left shoulder treatment.

10. On February 24, 2014 Claimant underwent and independent medical examination with Kathleen D'Angelo, M.D. After conducting a detailed records review and physical examination, Dr. D'Angelo determined that Claimant only suffered left elbow and knee contusions as a result of the March 14, 2013 accident. She explained that Claimant's left shoulder complaints were not work-related because symptoms of acute trauma are worse in the immediate post-injury period and peak less than 72 hours after the incident. Claimant's delayed onset of left shoulder symptoms is inconsistent with a March 14, 2013 acute injury.

11. On March 9, 2014 Respondents filed a General Admission of Liability (GAL) acknowledging that Claimant was entitled to receive Temporary Total Disability (TTD) benefits for the period January 28, 2014 through March 6, 2014. Claimant resumed full duty employment on March 6, 2014.

12. On May 1, 2014 Claimant returned to Dr. Gellrick for left knee and shoulder symptoms. She referred Claimant for a second left shoulder surgical evaluation.

13. On May 22, 2014 Dr. Gellrick concluded that Claimant had reached Maximum Medical Improvement (MMI). She assigned Claimant a 4% upper extremity impairment rating for his left shoulder and a 7% lower extremity impairment rating for his left knee. Dr. Gellrick also recommended maintenance care in the form of physical therapy and injections.

14. On July 19, 2014 the parties executed a stipulation in which Respondents acknowledged that Claimant was entitled to reasonable, necessary and related medical care. However, Respondents preserved all rights under the law to challenge Claimant's need for future care.

15. On August 4, 2014 Respondents filed a Final Admission of Liability (FAL). The FAL was consistent with Dr. Gellrick's MMI and impairment determinations. The FAL also acknowledged reasonable and necessary medical maintenance benefits. On August 20, 2014 Respondents filed an Amended FAL to correct a calculation error in Claimant's permanent Partial Disability (PPD) award.

16. On September 19, 2014 Claimant underwent a left shoulder MRI. The MRI revealed a normal acromioclavicular joint. The supraspinatus and infraspinatus tendons remained in continuity. The subscapularis tendon was normal. The long head of the biceps tendon was intact without sublaxation or tear. There was no labral tear or rotator cuff tendon tear.

17. On September 29, 2014 Claimant returned to Dr. Schneider for an examination. Dr. Schneider recounted that Claimant's September 19, 2014 left shoulder MRI revealed bursal-sided tendinopathy of the supraspinatus, but was otherwise normal. He performed a subacromial steroid injection and recommended additional physical therapy.

18. On November 17, 2014 Dr. Schneider reported that Claimant did not benefit from the subacromial steroid injection. He recommended a left shoulder arthroscopic rotator cuff repair.

19. On December 2, 2015 Respondents denied Dr. Schneider's surgical request. On January 2, 2015 Dr. Schneider again requested authorization for left rotator cuff repair. He noted that all conservative care, including injections, physical therapy, rest and exercise had been exhausted.

20. On March 15, 2015 Wallace K. Larson, M.D. conducted a medical records review. He concluded that Claimant did not sustain a work-related left shoulder injury on March 14, 2013. Claimant specifically did not suffer a left shoulder rotator cuff tear warranting surgery. Moreover, the proposed surgery was not reasonable or necessary because Claimant's left shoulder MRI did not demonstrate any traumatic changes or specific pathology.

21. On August 26, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Larson. Dr. Larson maintained that Claimant did not sustain a work-related rotator cuff tear warranting surgical intervention. He explained that the 2013 and 2014 MRI films were "quite reassuring in terms of the anatomic integrity of his – the shoulder." Claimant's left shoulder MRIs in 2013 and 2014 simply did not support the need for surgery. Although the 2013 MRI demonstrated mild roughening of the articular

surface consistent with tendinopathy, Dr. Larson commented that shoulder MRI's tend to reflect some degree of tendinopathy that does not constitute a true abnormality. Dr. Larson thus agreed with the radiologist that Claimant did not exhibit a left rotator cuff tear.

22. On June 25, 2015 Dr. Gellrick authored a special report in response to Dr. Larson's medical records review. She emphasized Dr. Schneider's opinion that, although it had been almost two years since Claimant's accident, the January 2015 MRI still showed a high degree of tendinopathy. Dr. Gellrick noted that Dr. Schneider believed Claimant's tendinopathy was consistent with bursal-sided tearing of the rotator cuff. She specifically noted that Claimant "could very well have tearing on the bursal side of the rotator cuff with the tendinopathy." Moreover, Dr. Gellrick explained that Claimant has failed conservative treatment including injections, therapy, rest and exercise. She summarized that all conservative measures have been exhausted and Claimant requires left shoulder surgery.

23. On July 17, 2015 Dr. Schneider authored a special report in response to Dr. Larson's medical records review. He explained that delayed presentation is common. His report specified that "[o]ften times the primary complaint arises from the contusion injury to the elbow, but as time passes, the shoulder becomes the main area of complaint. This is associated with a stretch injury of the rotator cuff tendon and/or direct contusion of the cuff tendon to the underside of the acromion in the shoulder. Therefore, I do believe this injury is work related." Dr. Schneider also disagreed with Dr. Larson's opinion that the MRI scans were negative. He reported that "there is a high degree of tendinopathy of [Claimant's] cuff tendons."

24. Dr. Larson testified that Claimant reported no benefit from the subacromial injection. He remarked that a subacromial injection is an important diagnostic tool designed to determine whether a patient's pain generator is the rotator cuff. If a patient receives no benefit from the injection, a rotator cuff diagnosis is most likely incorrect. Furthermore, because Claimant did not report immediate pain in his left shoulder after the fall on March 14, 2013, it is unlikely that Claimant sustained any traumatic injury to his left shoulder. Dr. Larson summarized that Claimant's lack of reported pain symptoms for six weeks following the injury and absence of clinical findings over time that have not strongly reflected a rotator cuff tear, suggests that Claimant has not sustained an injury to his left rotator cuff necessitating surgical intervention.

25. Dr. Larson concluded that it is not reasonable to perform exploratory surgery on Claimant's left shoulder simply based on complains of pain. There needs to be a positive and supportable reason for the surgery instead of an absence of reasons not to do the surgery. Dr. Larson noted that every surgery has risks and Dr. Schneider's proposed surgery has the potential for joint irritation or damage. He concluded that the likelihood of finding a traumatic injury in Claimant's shoulder that could be improved with surgery is very low.

26. Claimant has demonstrated that it is more probably true than not that the request for left shoulder arthroscopic rotator cuff surgery by Dr. Schneider is

reasonable, necessary and causally related to his March 14, 2013 admitted industrial injury. On March 14, 2013 Claimant fell onto a hard surface and struck his left elbow. Although Claimant did not initially report left shoulder pain to medical providers, on May 7, 2013 he mentioned that his left shoulder had been symptomatic since his March 14, 2013 accident but he had expected the pain to resolve. On July 25, 2013 Claimant began receiving medical treatment from Dr. Gellrick. She recorded that Claimant had positive impingement signs and questioned whether he suffered from rotator cuff pathology. Dr. Gellrick diagnosed Claimant with a left shoulder strain and contusion from the jolt of falling. On October 11, 2013 Dr. Schneider remarked that Claimant's mechanism of injury was consistent with a left shoulder injury. He suspected a possible SLAP tear and requested an MRI. An October 28, 2013 MRI revealed roughening of the articular surface of the supraspinatus tendon as well as minor signal changes within the tendon. The MRI findings were consistent with tendinopathy.

27. On September 29, 2014 Dr. Schneider recounted that Claimant's September 19, 2014 left shoulder MRI revealed bursal-sided tendinopathy of the supraspinatus. He performed a subacromial steroid injection and recommended additional physical therapy. On November 17, 2014 Dr. Schneider reported that Claimant had not benefitted from the subacromial steroid injection and recommended a left shoulder arthroscopic rotator cuff repair. Dr. Schneider subsequently explained that all conservative care, including injections, physical therapy, rest and exercise had been exhausted.

28. In contrast to Dr. Schneider's surgical request, Dr. Larson determined that Claimant did not suffer a left shoulder rotator cuff tear warranting surgery. Moreover, the proposed surgery was not reasonable or necessary because Claimant's left shoulder MRI's did not demonstrate any traumatic changes or specific pathology. Dr. Larson summarized that Claimant's lack of reported pain symptoms for six weeks following the injury and absence of clinical findings strongly reflecting a rotator cuff tear suggested that Claimant had not sustained an injury to his left rotator cuff necessitating surgical intervention. Finally, because Claimant did not benefit from a subacromial injection, a rotator cuff diagnosis is most likely incorrect. However, Dr. Gellrick persuasively maintained that Claimant warranted the left shoulder surgery requested by Dr. Schneider. Although it had been almost two years since Claimant's accident, the January 2015 MRI showed a high degree of tendinopathy. She explained that Claimant "could very well have tearing on the bursal side of the rotator cuff with the tendinopathy." Moreover, Dr. Gellrick explained that Claimant has failed conservative treatment including injections, therapy, rest and exercise. Furthermore, Dr. Schneider explained that Claimant's delayed presentation was common. He explained that, although a patient may initially present with an elbow contusion, the shoulder becomes the main area of complaint over time. Dr. Schneider remarked that Claimant's left shoulder injury was work-related because Claimant's symptoms were associated with a stretch injury of the rotator cuff tendon or a direct contusion of the cuff tendon to the underside of the acromion in the shoulder. Based on the medical records and persuasive opinions of Drs. Gellrick and Schneider, left shoulder arthroscopic rotator

cuff surgery is reasonable, necessary and related to Claimant's March 14, 2013 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 left shoulder arthroscopic rotator cuff surgery by Dr. Schneider is reasonable, necessary and causally related to his March 14, 2013 admitted industrial injury. On March 14, 2013 Claimant fell onto a hard surface and struck his left elbow. Although Claimant did not initially report left shoulder pain to medical providers, on May 7, 2013 he mentioned that his left shoulder had been symptomatic since his March 14,

2013 accident but he had expected the pain to resolve. On July 25, 2013 Claimant began receiving medical treatment from Dr. Gellrick. She recorded that Claimant had positive impingement signs and questioned whether he suffered from rotator cuff pathology. Dr. Gellrick diagnosed Claimant with a left shoulder strain and contusion from the jolt of falling. On October 11, 2013 Dr. Schneider remarked that Claimant's mechanism of injury was consistent with a left shoulder injury. He suspected a possible SLAP tear and requested an MRI. An October 28, 2013 MRI revealed roughening of the articular surface of the supraspinatus tendon as well as minor signal changes within the tendon. The MRI findings were consistent with tendinopathy.

6. As found, on September 29, 2014 Dr. Schneider recounted that Claimant's September 19, 2014 left shoulder MRI revealed bursal-sided tendinopathy of the supraspinatus. He performed a subacromial steroid injection and recommended additional physical therapy. On November 17, 2014 Dr. Schneider reported that Claimant had not benefitted from the subacromial steroid injection and recommended a left shoulder arthroscopic rotator cuff repair. Dr. Schneider subsequently explained that all conservative care, including injections, physical therapy, rest and exercise had been exhausted.

7. As found, in contrast to Dr. Schneider's surgical request, Dr. Larson determined that Claimant did not suffer a left shoulder rotator cuff tear warranting surgery. Moreover, the proposed surgery was not reasonable or necessary because Claimant's left shoulder MRI's did not demonstrate any traumatic changes or specific pathology. Dr. Larson summarized that Claimant's lack of reported pain symptoms for six weeks following the injury and absence of clinical findings strongly reflecting a rotator cuff tear suggested that Claimant had not sustained an injury to his left rotator cuff necessitating surgical intervention. Finally, because Claimant did not benefit from a subacromial injection, a rotator cuff diagnosis is most likely incorrect. However, Dr. Gellrick persuasively maintained that Claimant warranted the left shoulder surgery requested by Dr. Schneider. Although it had been almost two years since Claimant's accident, the January 2015 MRI showed a high degree of tendinopathy. She explained that Claimant "could very well have tearing on the bursal side of the rotator cuff with the tendinopathy." Moreover, Dr. Gellrick explained that Claimant has failed conservative treatment including injections, therapy, rest and exercise. Furthermore, Dr. Schneider explained that Claimant's delayed presentation was common. He explained that, although a patient may initially present with an elbow contusion, the shoulder becomes the main area of complaint over time. Dr. Schneider remarked that Claimant's left shoulder injury was work-related because Claimant's symptoms were associated with a stretch injury of the rotator cuff tendon or a direct contusion of the cuff tendon to the underside of the acromion in the shoulder. Based on the medical records and persuasive opinions of Drs. Gellrick and Schneider, left shoulder arthroscopic rotator cuff surgery is reasonable, necessary and related to Claimant's March 14, 2013 industrial injury.

ORDER

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

Claimant's request for left shoulder arthroscopic rotator cuff surgery is granted.

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: October 7, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

#J9P2XIX40D1ZHOv 2

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **JOE MARQUEZ,** Claimant, vs. **EASTERN COLORADO AGGRETATES,** Employer, and **PINNACOL ASSURANCE,** Insurer, Respondents.	**COURT USE ONLY** **CASE NUMBER:** **WC 4-917-947-03**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hearing in this matter was held on July 14, 2015 before Administrative Law Judge (ALJ) Donald E. Walsh.

The claimant was present and represented by Nicole B. Smith Esq. The respondents were represented by Vito A. Racanelli Esq. This matter was digitally recorded in the Office of Administrative Courts' conference room in Colorado Springs, Colorado from 1:50 pm to 2:30 pm.

In this order, Joe Marquez will be referred to as the "claimant"; Eastern Colorado Aggretates will be referred to as the "respondent-employer"; and Pinnacol Assurance will be referred to as the "respondent-insurer."

Also in this order, if used, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2014); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

The claimant offered exhibits 1 through 14 into evidence and they were admitted without objection.

The respondents offered exhibits A through I into evidence and they were admitted without objection.

CERTIFICATE OF MAILING OR SERVICE

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

Nicole Smith Esq	wcservice@mcdivittlaw.com
Vito A. Racanelli Esq	RS3@rs3legal.com
Division of Workers' Compensation	cdle_wcoac_orders@state.co.us

DATE: October 5, 2015

/s/ original signed by:
Angela Heckman-Cowles
Court Clerk

ISSUES

Whether the claimant has established an entitlement to right knee surgery as being reasonable, necessary, and related to his industrial injury of April 20, 2013.

FINDINGS OF FACT

1. On April 20, 2013, the claimant was involved in a work-related accident which occurred when the lower portion of his right leg became pinned between a large pipe and a "saddle structure." The claimant's right fibula snapped when he fell backwards over the saddle structure, which was six to eight inches tall and acted as a fulcrum.

2. The claimant heard a "pop" during the accident, but he was unsure where the sound resonated from.

3. The claimant did not have a history of pain in his right knee prior to his industrial injury on April 20, 2013.

4. On April 26, 2013, the claimant was seen by Michael Morley, D.O., who documented a "non twisting injury" of the right fibula.

5. On May 10, 2013, the claimant was placed in a walking boot, at which time he was not bearing any weight on the right leg. Before he began using the walking boot, the right leg had been immobilized in a splint.

6. On June 7, 2013, the claimant followed-up with Dr. Morley, who noted that his swelling had resolved and pain had decreased.

7. The claimant returned to modified work in mid-June 2013 and those job duties required him to sit, stand, and walk.

8. The claimant stopped using crutches in August 2013.

9. On December 19, 2013, Dr. Morley recommended a MRI based on reported posterior lateral right knee pain.

10. On December 30, 2013, the claimant underwent a right knee MRI, the results of which suggested the existence of a complete tear of the anterior cruciate ligament ("ACL") and a possible lateral meniscus tear.

11. On January 29, 2014, Dr. Abbott described the ACL tear as "old."

12. On March 31, 2014, Christopher Jones, M.D. recommended a right knee arthroscopy to address the possible meniscus tear.

13. On April 25, 2014, Gary Zuehlsdorff, D.O. issued a report after reviewing the claimant's medical records several times, in which he concluded that the right knee condition is not work-related. Dr. Zuehlsdorff based his opinion on the lack of any documented knee symptoms until December 19, 2013, and the physical therapy records from June 20, 2013 and August 6, 2013 which demonstrate that the claimant's right knee was feeling great and he was experiencing only ankle pain.

14. On March 5, 2015, the claimant was examined by Allison Fall, M.D., who agreed with Dr. Zuehldorff's opinion that the right knee condition is not work-related. Dr. Fall based her opinion on the lack of any acute signs of a right knee injury, and she observed that a proper causation analysis was not contemporaneously performed when the claimant's knee pain first arose.

15. A post-hearing deposition of Dr. Fall was taken on August 12, 2015. Dr. Fall testified consisted with her IME report. She testified that a right knee injury was possible based on the claimant's mechanism of injury, but did not think that the medical records supported a knee injury.

16. An evidentiary deposition of Dr. Michael Morley took place on March 23, 2015. Dr. Morley was admitted as an expert in the field of orthopedic surgery.

17. Dr. Morley initially saw the claimant for an injury to his ankle and leg. He observed that the claimant's mechanism of injury was "[claimant] had a crushing injury to his leg while he was at work. And my understanding was there are several barrels or large containers that crushed his ankle, his right ankle." Dr. Morley further indicated that the barrels impacted the claimant's entire lower extremity on the right side.

18. Dr. Morley opined that the ankle and leg were initially treated non-operatively with splinting, casting, and an Exogen bone stimulator. Dr. Morley observed that the claimant was on crutches for about four or five months. Dr. Morley indicated that when the claimant began weight bearing it was initially toe-touch weight bearing.

Dr. Morley explained he "began with toe-touch weightbearing, which means using assisted devices, crutches, and he may not experience knee pain at that point."

19. Dr. Morley opined that the claimant did not initially complain of right knee pain "because the focus was on the swelling. [The claimant] had a crush injury to his right ankle, his right leg. So initially the focus was on the right ankle and the lower part of his leg. He did not complain of knee pain until later in the process when he was trying to ambulate."

20. Dr. Morley opined that the ACL and lateral meniscus tear are related to the work injury that the claimant suffered on April 20, 2013. He further testified that in his opinion the right ACL and lateral meniscus tear are consistent with the claimant's mechanism of injury. Dr. Morley explained that "when [the claimant] had a crushing injury to his ankle, the body twisted and he sustained an injury to his knee. He sustained a ligamentous injury to his knee."

21. Dr. Morley opined that it is medically reasonable to perform the right knee arthroscopy with partial meniscectomy and possible ACL reconstruction surgery on the claimant's right knee. Dr. Morley explained that the surgery is reasonable because the claimant "is a younger man. He had a ligamentous injury to his knee. It would be reasonable to reconstruct that to allow him to continue with his work and his daily activities."

22. Dr. Timothy Hall performed an independent medical evaluation on December 16, 2014.

23. Dr. Hall opined that "within a reasonable degree of medical probability that [the claimant's] right knee pathology/symptomatology and need for intervention is the direct consequence of his 04/20/2013 injury while at work."

24. The ALJ finds the analysis and opinions of Dr. Morley to be credible and more persuasive than medical opinions to the contrary.

25. The claimant has established that it is more likely than not that his need for surgery to his right knee is reasonable, necessary, and related to his industrial injury of April 20, 2013.

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. As found above the ALJ concludes that the medical analyses and opinions of Dr. Morley are credible and more persuasive than medical evidence to the contrary.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the right knee derangement is related to the industrial injury that he sustained on April 20, 2013. The claimant has established by preponderance of the evidence that the right knee surgery recommended by Dr. Jones is reasonable, necessary, and related and is the responsibility of the respondent-insurer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the arthroscopic surgery as recommended by Dr. Jones.

2. The respondent-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.

DATE: October 2, 2015

/s/ original signed by:

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

ISSUES

The parties agreed prior to the hearing that the only issue to be decided by the ALJ was compensability.

FINDINGS OF FACT

1. The claimant timely reported an injury to his left knee that he stated occurred on April 15, 2013 at work while performing his normal duties. The claimant was cleaning the glass doors to the library at the respondent-employer, moved to allow students through the door, and felt a pop in his left knee. The claimant indicated that the onset of pain occurred when he "pivoted." Pivot is defined as "a turning movement on a pivot or while standing in place."

2. On April 16, 2013, the claimant was seen by Dr. William Watson, with whom the claimant had previously treated for both knees. Dr. Watson had previously taken x-rays of the claimant's left knee on February 26, 2013, which "look(ed) very good." The February 26, 2013 x-rays "show(ed) some mild degenerative changes in the lateral compartment but the medial compartment (was) well maintained." On April 16, 2013, the day after the claimant felt a pop in his left knee, however, Dr. Watson became "concerned about a medial meniscal tear," and noted that now the claimant "has true locking and catching and giving way."

3. On April 19, 2013, the claimant was seen by Bernice Barnes, NP, at CCOM. Nurse Barnes assessed the claimant with a "Left knee strain," and noted that, based on the claimant's visit that day, "the history of this knee injury is vague." Nurse Barnes did not opine that the injury was work-related, however.

4. On April 24, 2013, the claimant was seen by Dr. George Schwender at CCOM. Dr. Schwender opined: "In my opinion, the patient's left knee injury is work related as the objective findings are consistent with his history and a work related mechanism of injury."

5. On May 7, 2013, the claimant was seen by Dr. Watson, who reported that the MRI performed on May 1, 2013 showed "a posterior horn tear of the medial meniscus."

6. On May 13 and 29, 2013, the claimant was seen by Dr. Mark Porter of Parkview Orthopedics, per Dr. Watson's referral for a second opinion regarding surgery. Dr. Porter assessed a "Degenerative tear of posterior horn of medial meniscus."

7. On May 15, 2013, the claimant was seen by Dr. Richard Nanes of CCOM, who noted that the claimant was scheduled for a left knee arthroscopic surgery on June 8, 2013, with Dr. Porter, but that the surgery was in limbo due to personal financial issues. Dr. Nanes concurred with the torn meniscus diagnosis.

8. On May 29, 2013, the respondent filed a Notice of Contest in this matter.

9. On August 7, 2013, the claimant was seen by Dr. Nanes, who placed the claimant at MMI and issued the following impairment ratings: 10% lower extremity; 4% whole person. Dr. Nanes noted a permanent impairment and ordered permanent restrictions, but did not authorize maintenance care.

10. The respondent caused the claimant to undergo an Independent Medical Examination by Dr. Nicholas Olsen, which was completed on February 24, 2014.

11. Upon the conclusion of the IME, which included a review of claimant's medical treatment records, obtaining a personal history from claimant, and performing his own physical examination of claimant, Dr. Olsen concluded that claimant's problems with his left knee are degenerative in nature and not due to a work injury.

12. Dr. Olsen further opined that the events on April 15, 2013, as described by the claimant, were not a sufficient enough mechanism of injury to aggravate a prior degenerative condition. By the claimant's own report, there was no acute event that would have led to an aggravation, temporary or permanent.

13. At hearing on August 13, 2015, the claimant testified as to the mechanism of his injury - that he was cleaning the glass doors to the library at the respondent-employer, moved by pivoting "real fast" on his left knee to allow students through the door, twisting his knee, and felt a pop in his left knee.

14. Prior to the date of hearing the claimant does not appear to have described a twisting of his knee. In his first visit to CCOM on April 19, 2013 the claimant described the mechanism of injury as occurring while "bending and squating {sic}" while cleaning the windows. In the subjective narrative the nurse practitioner notes:

> [The claimant] states that he has pain in his left knee due to bending and stooping while he is washing windows. He states that he is required to wash the windows on doors that are used by the students who smudge them. He states

> that he has to move quickly when the students are traversing the doors where he is washing the windows and maybe this movement has caused some kind of twisting of his knee. He states that the injury is as a result of the fast-paced movement of stepping away from students passing through the doorways. He also believes that the crouching stooping and standing which is the repetitive movement has caused the pain in his knee. He cannot however describe a specific time when he felt acute knee pain.

15. The ALJ finds it significant that the claimant first saw his own physician, Dr. Watson, after feeling pain in his knee subsequent to the reported date of injury and that Dr. Watson's notes do not indicate that there is a work related connection.

16. The ALJ finds it significant that, Dr. Porter, to whom the claimant was referred by Dr. Watson, indicated that the claimant's condition was from degenerative arthritis of the left knee and a degenerative tear of the posterior horn of the medial meniscus.

17. The ALJ finds it significant that the claimant, on his first visit to CCOM several days subsequent to the reported date of injury, could not describe a specific time when he felt acute pain, and in fact mused over several possible scenarios as to how his condition 'might' have come about.

18. The ALJ does not find the claimant's testimony to be credible.

19. The ALJ finds that the opinions and analyses of Dr. Olsen are credible and more persuasive than opinions and analyses to the contrary.

20. The ALJ finds that the claimant has failed to establish that it is more likely than not that on April 15, 2013 he sustained a compensable injury arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant shoulders the burden of proving by a preponderance of the evidence that he sustained an injury arising out of and within the course of his employment and that he is entitled to benefits under the Act. §§ 8-43-201(1) and 8-41-301(1), C.R.S.*; see City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals* Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals* Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the

evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones,* 688 P.2d 1116 (Colo. 1984).

2. As established by a preponderance of the credible evidence in this matter, the claimant failed to meet his burden of proof that he sustained a compensable industrial injury on April 15, 2013. By his own report, the claimant was not involved in any type of traumatic event on April 15, 2013: he did not trip, he did not fall, and he did not hit or bang his knee. He merely experienced some pain while at work. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

3. The medical treatment records in this case are very clear that claimant suffers from a pre-existing condition of degenerative osteoarthritis and that the medial meniscal tear identified on the MRI scan taken on May 1, 2013 predated the April 15, 2013 reported date of injury. Dr Porter concluded that claimant suffers from degenerative osteoarthritis and a degenerative medial meniscus tear.

4. The ALJ concludes that the claimant is not credible.

5. Additionally, Dr. Olsen's credible and persuasive analyses indicate that the claimant did not suffer an injury or an aggravation of a pre-existing condition and that the claimant merely manifested symptoms of his underlying degenerative condition.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that on April 15, 2013 he sustained a compensable injury arising out of and in the course of his 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: October 22, 2015

/s/ original signed by:

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

ISSUES

- Did Respondent overcome the opinion of the DIME physician (David Orgel, M.D.) that Claimant was not at MMI by clear and convincing evidence.
- If Respondent overcame the DIME physician's opinion on MMI, what is Claimant's medical impairment rating.
- Is the hip arthroscopy surgery proposed by Derek Johnson, M.D. reasonable, necessary and related to Claimant's December 27, 2012 injury.
- Whether the hip arthroscopy surgery proposed by Dr. Johnson should be authorized pursuant to W.C.R.P. 16-10(E).

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on December 27, 2012 while working as an overnight grocery clerk for Respondent-Employer. She was walking in the backroom of the store when she tripped over baling wire and fell forward. In the medical records, Claimant described falling forward with her arms outstretched and onto her left side. Claimant fell onto her left shoulder and left lateral thigh[1], experiencing pain in those areas of her body.

2. On December 27, 2012, Claimant was evaluated by Jennifer Hammond, M.D. at Concentra, the ATP for Respondent. She had pain on palpation of the long head biceps tendon with biceps flexion (with resistance) and mild swelling was noted in the left lateral thigh, along with tenderness to palpation. Claimant's history was noted to be non-contributory. The assessment was left biceps strain and contusion-left lateral thigh. She was restricted from reaching above the shoulders and required to wear a sling while at work.

3. Claimant returned to Concentra on December 31, 2012 and was evaluated by Juan Miranda-Seijo, M.D. She complained of pain mainly in the left shoulder (anterior). The x-ray of her shoulder was negative for fractures. The diagnosis was left shoulder strain. Dr. Miranda-Seijo issued restrictions of no lifting over 15 pounds to waist level and no overhead lifting. The plan was for Claimant to mobilize off sling, do self exercises and to take ibuprofen. There was no reference to an examination of Claimant's hip or thigh by Dr. Miranda-Seijo.

[1] In Dr. Paz' IME report, it was noted that Claimant had an iPad over her right shoulder, which draped over her left side and she fell on it. The presence of the iPad was also noted by Dr. Bisgard.

4. Dr. Miranda-Seijo re-examined Claimant on January 16, 2013. Claimant continued to have pain in her left shoulder which was positive for impingement. The diagnosis was shoulder strain and rotator cuff injury. Claimant was working within restrictions, taking Vicodin and doing PT. Dr. Miranda-Seijo noted impingement and pain on examination. He changed Claimant's medications and ordered an MRI.

5. Dr. Miranda-Seijo evaluated Claimant on January 22, 2013, at which time his physical findings were similar to the 1/16/13 appointment. Positive impingement was noted for the left shoulder. The results of the MRI were pending and Claimant's restrictions were maintained.

6. An MRI of the left shoulder (without contrast) was done on January 24, 2013. Michael Otte, M.D. noted a contusion in the greater tuberosity of the humerus. No linear fracture line was detected, but Dr. Otte suspected involvement especially at the superior facet for supraspinatus implantation. Claimant's rotator cuff was intact and the MRI was negative for labral tear or long head biceps instability. The anterior and posterior labrum was intact.

7. Claimant was next seen on January 28, 2013, at which time Dr. Miranda-Seijo stated the MRI showed a bone contusion only at the level of the supraspinatus, which would explain her pain on abduction. Claimant was to continue her PT and her restrictions were continued.

8. Claimant returned to Concentra on February 19, 2013. At that time, her pain was noted to be getting better. On examination of the left shoulder, impingement, O'Briens and Jobes were all noted to be negative. The diagnosis was shoulder contusion. Claimant was to continue to PT for an additional three weeks and a flector patch was prescribed by Dr. Miranda-Seijo.

9. Dr. Miranda-Seijo examined Claimant on March 12, 2013 and noted her left shoulder was unchanged. He referred Claimant to Dr. Sacha (physiatrist) and maintained her restrictions.

10. Claimant was evaluated by Dr. Sacha on April 1, 2013. Her symptoms were documented as pain localized to the left anterolateral shoulder, which was worse with overhead activity and pain over the left lateral hip. Dr. Sacha's impression was humeral head contusion, with some secondary impingement and left greater trochanteric bursitis. He recommended an ultrasound-guided injection of the left subacromial bursa of the shoulder, a left greater trochanter injection and x-rays of the hip.

11. X-rays of Claimant's pelvis were taken on April 1, 2013. The x-rays showed normal and symmetric hip joints bilaterally, with no evidence of joint effusion or arthritic changes. No soft tissue abnormalities were seen and Claimant's left hip joint remained symmetric. The impression was normal left hip.

12. Claimant was examined by Dr. Sacha on April 16, 2013. Claimant related that she had 100% temporary relief after the greater trochanteric bursa injection and 90% lasting relief. No tenderness was noted over the hip or illotibial band. There was some pain noted in the shoulder, along with crepitus. Dr. Sacha's impression was shoulder impingement and hip bursitis. Dr. Sacha wrote a prescription for chiropractic and acupuncture for the shoulder, as Claimant was having pain in the proximal arm and left anterior shoulder.

13. Claimant returned to Dr. Miranda-Seijo for a follow-up evaluation on April 22, 2013. At that time, she reported that most of the pain in the posterior portion of her shoulder had resolved, although she had pain over the biceps groove. The injections with Dr. Sacha had helped the posterior pain, but not the anterior pain. The left shoulder was described as "unchanged". Claimant was to start chiropractic and acupuncture per Dr. Sacha.

14. Dr. Sacha referred Claimant to Jason Gridley, D.C., who examined her on April 30, 2013. Claimant was noted to have fallen on her outstretched left arm and suffered a contusion to her left hip. On physical examination of the shoulder, no bruising, swelling or joint effusion was noted. Claimant had subacromial discomfort and some radiating pain down the anterior left shoulder, along with discomfort upon resisted internal rotation with pain in the same pattern. Claimant was very tight in the posterior capsule, with multiple adhesions noted at the infraspinatus, tere major and minor, subscaplaris, pectoralis minor, anterior deltoids and supraspinatus. Dr. Gridley's impressions were left shoulder sprain/strain with mild impingement; mild somatic dysfunction of the left GH complex, with associated muscle spasm and myofacial adhesions as outlined in the examination. He recommended an initial trial of the active release techniques, joint manipulation, dry needling, biomedical acupuncture and NMR functional taping protocols.

15. Claimant was examined by Dr. Miranda-Seijo on May 29, 2013, at which time she reported the pain in her shoulder was better. She was doing chiropractic and acupuncture with Dr. Gridley and was going to see Dr. Sacha. Mild impingement was noted for the left shoulder. Dr. Miranda-Seijo's diagnosis remained shoulder contusion and he planned to see Claimant in follow-up. The ALJ infers that Dr. Miranda-Seijo was aware that Claimant was receiving chiropractic and acupuncture treatment for her shoulder; however, there was no specific reference to hip treatment in Dr. Miranda-Seijo's records admitted at hearing.

16. The ALJ finds that Dr. Miranda-Seijo did not treat Claimant's left lower extremity injury and there was no reference to any examination of her left hip by Dr. Miranda-Seijo. The ALJ also notes that the records Miranda-Seijo do not reference any complaints of pain in the hip or leg area, although the Concentra records appear to use a template whereby Claimant's pain complaints were repeated or copied into the report of each evaluation by Dr. Miranda-Seijo. Dr. Miranda-Seijo also made no reference to the reports he received from Dr. Sacha which referenced Claimant's treatment for hip symptoms.

17. Claimant returned to Dr. Sacha on June 4, 2013. Tenderness was noted over left hip and, as well as the illotibial band. Dr. Sacha's impression was hip bursitis, shoulder impingement that was resolving. At that time, he performed a left hip greater trochanteric bursa corticosteroid injection with ultrasound-guidance. Claimant was to have PT, chiropractic and acupuncture. This report was sent to Dr. Miranda-Seijo.

18. Dr. Sacha re-evaluated Claimant on June 18, 2013, at which time he noted a slightly antalgic gait to the left side. There was tenderness over the greater left trochanter, as well as the illotibial band. Dr. Sacha's impression was hip bursitis, rule out internal derangement of the hip, and shoulder pain (resolved). He recommended an MRI of the left hip. The ALJ notes that this report was sent to Dr. Miranda-Seijo.

19. An MRI of Claimant's left hip (without contrast) was done on June 24, 2013. Andrew Sonin, M.D. reviewed the films and noted: "as far as the intracapsular structures that Claimant's cartilage was intact and appropriate in thickness for the patient's age, with no significant joint effusion or synovitis". There was "a well-defined cleft at the base of the anterior superior labrum". Dr. Sonin opined: "This could represent a labral tear but the adjacent labrum is currently normal looking otherwise and therefore this likely represents a congenital variant." Dr. Sonin's impression was essentially normal MRI of the left hip, with a well-defined linear defect at the base of the anterior superior left acetabular labrum, which he deemed "more likely a congenital cleft than a pathological tear".

20. Claimant was examined by Dr. Sacha on July 9, 2013. She complained of continued pain in her left lateral thigh region. The pain symptoms were worse with squatting and improved with acupuncture. A left hip trochanteric bursa steroid/lidocaine injection was performed by Dr. Sacha. He recommended a gym and pool pass to help with an independent exercise program.

21. Claimant was seen by Dr. Gridley and received treatment as outlined in his initial report. She had her fifth treatment session on July 11, 2013, at which time she reported her left shoulder symptoms were almost entirely resolved. Dr. Gridley noted that he addressed Claimant's left lateral hip and thigh pain, using some vasopneumatic [c]upping, dry needling and acupuncture. Her left hip had responded to treatment; she was able to squat without pain and walk without discomfort.

22. Claimant returned to Dr. Gridley on July 18, 2013, at which time he noted that her shoulder was significantly better. Claimant had one focal area of discomfort on the anterior deltoid and the insertion of the supraspinatus. She received manipulation and cupping treatment for both the shoulder and the hip. Dr. Gridley's assessment was left shoulder sprain/strain with mild scapulothoracic involvement, improved/likely reached maximum therapeutic benefit; left lateral thigh myofacial pain and adhesions.

23. Dr. Sacha saw Claimant for a re-evaluation on July 30, 2013. He noted that she had completed seven months of care, including medications, physical therapy, strengthening and conditioning, injections and manual medicine. More particularly, she had one shoulder and three hip injections. Dr. Sacha's impression was shoulder

impingement and hip pain, resolved. Dr. Sacha found Claimant to have reached MMI as of 7/30/13, which needed to be confirmed by Dr. Miranda-Seijo. She had no work restrictions and for maintenance care, she was to be provided a gym and pool pass. Dr. Sacha felt she may need further costicosteroid injections for the hip or shoulder, if her symptoms worsened. Dr. Sacha assigned a 8% upper extremity impairment due to a loss of range of motion and no impairment for the hip.

24. The ALJ has no information that Claimant returned to Dr. Miranda-Seijo for confirmation of MMI and impairment.

25. Respondent filed a FAL on August 21, 2013, admitting for Dr. Sacha's 8% extremity rating. Respondent's FAL admitted to post-MMI medical treatment that was reasonable, necessary and causally connected.

26. Claimant returned to Dr. Sacha on September 10, 2013. In his examination, he noted mild tenderness over the left greater trochanter, as well as illotibial band. His impression was hip greater trochanter bursitis and left shoulder impingement. Dr. Sacha recommended left hip greater trochanteric bursa corticosteroid injection with ultrasound-guidance, which Dr Sacha performed in his office. Claimant noted 100% temporary relief indicating a diagnostic response to this procedure.

27. Dr. Sacha saw Claimant for a re-evaluation on October 1, 2013. At that time, she reported hip pain, which was worsening as the weather had gotten colder. She was having ongoing symptoms in her proximal left leg and Dr. Sacha noted tenderness over the trochanteric bursa, well as illotibial band. Dr. Sacha's impression was hip bursitis, rule out internal derangement of the hip vs. femur contusion, and shoulder impingement. Dr. Sacha concluded Claimant remained in MMI and required x-rays of her hip, as well as proximal leg. He recommended consideration of a trial of physical therapy vs. intraarticular costicosteroid injection of the hip. Dr. Sacha characterized this as maintenance care.

28. X-rays were taken of Claimant's femur and hip on October 1, 2013. David Solsberg, M.D. reviewed these films and noted the hip joint spaces were well maintained. There was mild sclerosis and regularity around the margin of the pubic synthesis. No hip joint arthritis was seen. Claimant's left femur showed a popcorn-like coarse calcification in the distal diaphysis of the femur. Repeat x-rays were taken on October 3, 2013. No fracture was identified and the distal of femoral diaphyseal lesion was thought to be consistent with an enchondroma.

29. Dr. Sacha saw Claimant for a follow-up on October 7, 2013 and she brought in the x-ray films. Dr. Sacha noted the x-rays showed evidence of some joint line thinning and mild degenerative changes at the hip. This was different than what was read by the radiologist. Dr. Sacha opined that with her history of not just the lateral greater trochanteric bursa pain, but also being worse when it is cold, this could be a strain of the internal part of the joint, which was causing some secondary greater trochanteric bursitis. Dr. Sacha noted tenderness over the greater trochanteric bursa,

with mild diminished range of motion with hip internal rotation compression. He recommended a one-time corticosteroid injection.

30. A Division of Workers' Compensation Independent Medical Examination was conducted by David Orgel, M. D. on January 10, 2014. At that time, Claimant had fairly minimal complaints regarding her left shoulder. She developed an ache in her left shoulder when she did extensive lifting at or above the shoulder height. Her primary complaint related to her left hip with persistent mild tenderness over her mid lateral thigh. Dr. Orgel noted that Claimant's had a persistent mildly tender lump around her lateral leg. Claimant reported a burning sensation into her lateral leg with prolonged ambulation, along with significant discomfort in her hip.

31. Dr. Orgel concluded that Claimant was at MMI for her left shoulder, but not for her left hip. He noted that the MRI was concerning for a labral abnormality. He recommended that Claimant be evaluated by an orthopedist for her hip pathology before proceeding to an MR arthrogram. Dr. Orgel assigned a 10% scheduled impairment for the upper extremity and 10% scheduled impairment for the lower extremity.

32. In his report dated 2-18-14, Dr. Sacha reviewed the DIME report from Dr. Orgel in which he opined that Claimant was not at MMI for the hip. Dr. Orgel recommended an orthopedic consultation for the hip, which Dr. Sacha felt was reasonable, along with the MRI arthrogram of the hip. Dr. Orgel also recommended gym and pool pass as maintenance and Dr. Sacha agreed. Dr. Sacha noted that Claimant's case did not need to be reopened because they were not sure whether there would be actually any type of active or interventional care.

33. Dr. Sacha examined Claimant on March 11, 2014. He noted that Claimant had been recommended for an MRI arthrogram of the left hip, as well as a gym and pool pass, but these were not authorized. He also noted that back in June, 2013, "we did suspect labral pathology". Dr. Sacha noted that Dr. Orgel conducted a DIME and he agreed with the MRI arthrogram, as well as the gym/pool pass recommendations. On examination Claimant was noted to have tenderness over the greater trochanter. Dr. Sacha's impression was hip pain; rule out labral tear; and shoulder impingement. Claiamnt was to have the MRI arthrogram and he referred Claimant for an orthopedic exam (Dr. Motz).

34. Dr. Sacha referred Claimant to Cary Motz, M.D., who evaluated her on April 4, 2014. Claimant reported pain localized to the groin and into the anterior region of the joint. Increased pain was noted with prolonged walking by Claimant, along with improvement with intraarticular and trochanteric bursal injections. Tenderness and mild limitations in ROM of the left hip were noted by Dr. Motz. Dr. Motz' assessment was hip pain, left trochanteric bursitis and left labral tear. Dr. Motz suspected that she needed a scope and referred Claimant to Dr. Johnson, who performed arthroscopies. The ALJ infers that Dr. Motz believed that Claimant's hip symptoms were related to her work injury.

35. An MRI (CT guided gadolinium) of the left hip was done on March 24, 2014, which was read by Arash Momeni, M.D. Dr. Momeni's impressions were subtle heterogeneity of the labrum at 10:00 and 12:00 positions, likely representative of an anterosuperior labral tear; right-sided greater trochanteric bursitis which also may be a source of pain.

36. Dr. Sacha re-evaluated Claimant on April 7, 2014. He reviewed the MRI of the hip which showed evidence of left hip superior anterior tear of the labrum and some mild degenerative changes; also evidence of greater trochanter bursitis. Dr. Sacha also noted that Claimant had been referred to Dr. Motz who felt that Claimant may need an arthroscopic hip procedure and recommended Dr. Johnson. Claimant was noted to have tenderness over the greater trochanter and walked with an antlagic gait. Dr. Sacha discussed possible surgical intervention with her and noted the case will be reopened as of the date of surgery.

37. The ALJ infers that the 3/24/14 MRI (with gladinium) would tend to illuminate Claimant's hip and the surrounding tissues in greater detail that than the MRI-scan done on 6/24/13.

38. Claimant was examined by Derek Johnson, M.D. on April 22, 2014 for persistent left hip pain, which she described as getting worse. Dr. Johnson's assessment was left hip pain, left labral tear of hip, femoracetabular impingement, trochanteric bursitis and left tendinitis of the hip/pelvic area. Dr. Johnson treated Claimant by arthrocentesis (injection) of her left hip, after which Claimant reported significant decrease in trochanteric bursa pain. Claimant was a candidate for arthroscopy of the left hip with femoroplasty, acetabuloplasty and labral repair.

39. Dr. Sacha examined Claimant on May 19, 2014, who noted pain localized to the hip and groin. He noted that Claimant had undergone an injection with another provider[2]. Dr. Sacha stated that Claimant had a history of greater trochanteric bursitis but also because of what was described as "their repetitive and recurrent nature", she likely had some pathology within the hip itself. Dr. Sacha's impression was greater trochanteric bursitis and rule out internal derangement of hip. He recommended a staged trochanteric injection and intraarticular injection.

40. Claimant returned to Dr. Sacha on September 9, 2014, at which time she reported that her hip had worsened since the last visit. Dr. Sacha noted that a left greater trochanteric injection and intraarticular injection was done four months ago and provided relief. Since Claimant had a history of a labral tear, Dr. Sacha felt it was quite likely that this was becoming more symptomatic. Dr. Sacha noted tenderness over the greater trochanter. She had positive hip rotation and compression test on the left side. His impression was internal derangement of the hip consistent with labral tear and hip bursitis. Claimant was going to be a re-evaluated by an orthopedic hip specialist (described as reasonable) and Dr. Sacha planned to see her after that.

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[2] This references a knee injection, which appears to be a typographical error, since the balance of Dr. Sacha's note refers to Claimant's hip.

41. On October 8, 2014, PA Kristine Genson of Denver-Vail Orthopedics requested x-ray guided steroid injection for Claimant's left hip, which was described as a diagnostic test. The diagnosis was hip pain with possible labral tear.

42. Dr. Sacha saw Claimant in what was described as a maintenance follow-up visit on October 21, 2014. She was noted to have a slight antalgic gait to the left and equivocal hip internal rotation and compression testing. Dr. Sacha's impression was internal derangement of the hip and greater trochanteric bursitis. He renewed Claimant's medications and noted she remained at MMI.

43. Respondent requested an independent medical evaluation with Mark Paz, M.D. on September 22, 2014. Dr. Paz noted Claimant had numbness of the left upper extremity, which was positive for weakness of the left shoulder. Claimant described left hip symptoms, as well as symptoms in the left groin region and left lateral aspect of the hip. He noted tenderness to palpation about the bursal region of the greater left trochanter. No crepitus was found with internal and external rotation of the right or left hip. Dr. Paz' assessment was left hip pain, left greater trochanteric bursitis, left labral defect, left shoulder pain, left shoulder impingement syndrome, nocturia, left upper extremity parasthesias, osteopenia.

44. Dr. Paz opined that given the medical records prior to 7/30/13, considering the subjective symptoms, findings on physical examination and response to treatment; all of these were consistent with a diagnosis of left greater trochanteric bursitis. He felt that it was not medically probable that the left hip labral tear was causally related to the 12/27/12 injury. Dr. Paz noted that Claimant may require access to medical maintenance in the form of corticosteroid injections for the left greater trochanteric bursitis. He felt the surgical treatment of the left labral hip tear might be reasonable necessary, but in his opinion this was not causally related to the industrial injury.

45. Dr. Sacha examined Claimant on November 18, 2014. He noted tenderness over the greater trochanteric bursa, along with equivocal hip internal rotation and compression testing. His impression was internal derangement of the hip, greater trochanteric bursitis and left shoulder impingement. Claimant was to continue the home exercise program and had a follow-up with Dr. Johnson.

46. Dr. Sacha issued a letter, dated November 18, 2014, in response to an inquiry from Ms. Jensen at Sedgwick Insurance. He reviewed Dr. Paz' report and stated that he felt all along that MMI should never have been reversed. Dr. Sacha opined that the orthopedic evaluation, the MR arthrogram of the hip, the corticosteroid injection of the hip and the home exercise program were all appropriate as maintenance care. He noted Claimant had not improved despite the above care, which solidified his opinion with regard to MMI.

47. In response to the inquiry about causality, Dr. Sacha described this as a more difficult issue. He noted Claimant had a fall which was the cause of her injury. She had hip pain, shoulder pain and arm pain after this occurred, which continued to the present. Dr. Sacha noted that Claimant had no prior hip issues. Dr. Sacha stated:

"Based on this, I cannot see how there can be a differentiation with a traumatic fall and the bursitis being work related but the labrum is not. I do not think you can make that distinction. So, based on my evaluation of this patient, if the hip is being accepted as part of this Workers' Compensation claim and there is no medical data that support prior injuries or trauma that would cause this labral tear, then I would state that all hip pain and pathology would be related to this Workman's [sic] Compensation claim, the date of which is 12/27/12".

48. Dr. Johnson saw Claimant in a follow-up evaluation on February 10, 2015. Improvement in her pain was noted and Dr. Johnson's assessment was the same as the 4/22/14 evaluation. Claimant was to receive another intraarticular hip injection in April and if her pain worsened, they would consider hip arthroscopy.

49. Dr. Orgel saw Claimant for a follow-up DIME on February 19, 2015. The ALJ notes that he had the reports of Drs. Paz and Sacha concerning Claimant's hip. On the question of whether the hip was work-related, Dr. Orgel concurred with Dr. Sacha. He noted that the MRI showed a labral defect either of "congenital or trauma-related etiology". Dr. Orgel noted that there was no evidence to suggest that she had a pre-existing labral abnormality and the mechanism of injury with a fall after catching her foot on a cord certainly could have caused the labral abnormality, as well as the greater trochanteric injury. He opined that it was "clear that this is reasonably related to her injury and is work related". Dr. Orgel determined that she was not at MMI because of her continued hip complaints.

50. Dr. Orgel concluded Claimant sustained a 14% upper extremity impairment and 8% lower extremity impairment.

51. The ALJ finds that it is significant that Dr. Orgel concluded on both occasions that he examined Claimant that she was not at MMI because of her hip.

52. On June 3, 2015, Dr. Paz issued a supplemental report. Dr. Paz reviewed Dr. Orgel's 2/19/15 report, but noted there were no changes in his 10/15/14 opinion.

53. On June 22, 2015, Claimant was examined by Elizabeth Bisgard, M.D. The ALJ notes that Dr. Bisgard's report indicated she is board-certified in occupational medicine and is Level II accredited pursuant to the W.C.R.P[3]. Claimant reported interior groin pain with flexion of her left hip. She had pain over her greater trochanteric bursa with abduction. Tenderness to palpation over the greater trochanteric bursa and anterior groin was noted. Dr. Bisgard diagnosed left shoulder contusion and impingement, left trochanteric bursitis and left hip labral tear. Dr. Bisgard opined that Claimant's current symptoms were consistent with a labral tear as a result of her work-related injury. Although there was evidence of a degenerative tear, her left hip was clearly asymptomatic until the work-related fall.

[3] One of the arguments raised by Respondent is that Dr. Bisgard did not have a full set of Claimant's treatment records. The ALJ notes that Dr. Bisgard reviewed Dr. Orgel's DIME reports, as well as Dr. Sacha's records both of which summarized Claimant's course of treatment following her injury.

54. Timothy O'Brien, M.D. testified as an expert in orthopedic surgery, as well as a Level II accredited physician pursuant to the W.C.R.P. He has performed approximately 1800 total hip replacements, 3000 total knee replacements and somewhere between 50 and 75 hip arthroscopies. Dr. O'Brien reviewed Claimant's treatment records and issued a report, dated August 21, 2015. He did not examine Claimant.

55. Dr. O'Brien concluded that the diagnosis of a greater trochanteric bursitis was a discrete and new diagnosis, not related to the work injury. This was based on the fact that Dr. Hammond initially diagnosed a thigh contusion and there was a distinction between the thigh and hip. (O'Brien deposition page 10:5-24). Dr. O'Brien described this contusion as minor. (O'Brien deposition page 7:25-8:2). Dr. O'Brien testified that the thigh contusion would have resolved by the end of December, 2013. Dr. O'Brien opined that a thigh contusion did not lead to greater trochanteric bursitis. (O'Brien deposition page 11:18-12:17). He also stated that the labral tear, which was noted in the MRI scan of 2014, was a new diagnosis. Dr. O'Brien described the MRI in June 2103 as normal. However, Dr. O'Brien did not provide an explanation for the labral defect noted in the MRI scan of June, 2013. (O'Brien deposition page 13:19-14:11).

56. Dr. O'Brien stated that a fall of this type who was not the kind of injury mechanism that produces a labral tear. He believed that if the injury was bad enough to produce a clinically significant bruise to the outside of the hip, there would have been swelling on the MRI scan. Dr. O'Brien stated Claimant was at MMI for her work related injuries.

57. The ALJ finds that there is no credible and persuasive evidence, including medical records, to show that Claimant ever complained of or sought treatment for left hip symptoms prior to the prior to her industrial injury of 12/27/12. The ALJ also finds that Dr. O'Brien's opinion that the labral tear noted on the MRI scan of 2014 was a new diagnosis is not supported by the evidence.

58. The ALJ credits the opinions of Drs. Orgel, Sacha and Bisgard on the issue of whether Claimant's left trochanteric pain and the need for treatment was related to the work injury. Further, the ALJ credits the opinions of Drs. Orgel, Sacha and Bisgard as to whether the labral tear was related to the work injury.

59. The ALJ has concluded that Claimant injured her left hip on December 27, 2012, which required medical treatment.

60. The ALJ finds that the opinions of Dr. O'Brien and Dr. Paz were not sufficiently persuasive to overcome the opinions of the DIME Physician, Dr. Orgel. While Dr. O'Brien distinguished between a thigh bruise and an injury to Claimant's hip, his report and deposition testimony did not provide an explanation for the fact that Claimant had no prior symptoms until the industrial injury and the presence of a labral tear was confirmed by both MRI scans. The ALJ is not convinced that Claimant's hip symptoms were the result of a new injury. In addition, Dr. O'Brien's opinions are undercut by the fact that he did not examine the Claimant. The ALJ was not persuaded

by Dr. Paz' opinion that Claimant's left greater trochanteric bursitis was related to the industrial injury, but not the labral tear.

61. The ALJ finds that Respondent has not met its burden of proof and did not overcome the opinions of the DIME physician with regard to MMI.

62. The ALJ finds that Claimant has met her burden of proof and established that the proposed hip surgery is reasonable and necessary, as well as related to the subject injury.

63. The ALJ finds that Respondent is liable for the hip surgery proposed by Dr. Johnson, however, a request for authorization of said surgery is not before the ALJ.

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

CONCLUSIONS OF LAW

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

Generally

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

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

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

The DIME physician's opinion on MMI, causation and impairment are binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). The party seeking to overcome the DIME physician's finding

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

In this case, Respondent bears the burden of overcoming Dr. Orgel's findings by clear and convincing evidence. 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. *Metro Moving and Storage Co. v. Gussert*, *supra.*

Overcoming the DIME On the Issues of MMI and Causation

Respondent contends that Dr. Orgel, the DIME physician, erred in determining that Claimant's hip injuries were causally related to the 1/27/12 fall. Respondent also takes issue with Dr. Orgel's conclusion that Claimant was not at MMI and required additional treatment for her hip. The ALJ concludes that this requires a two-part analysis, starting first with the question of causation. The ALJ has considered both evaluations of Claimant performed by Dr. Orgel and her course of treatment with the authorized treating physicians. The ALJ has also considered the independent medical evaluations obtained by Respondent (Dr. O'Brien and Dr. Paz), as well as Dr. O'Brien's testimony. The ALJ disagrees that Respondent has made the requisite showing on this issue.

Following the first DIME, Dr. Orgel concluded that Claimant needed an orthopedic evaluation and implicit in his conclusions was the opinion that Claimant's hip symptoms were caused by the industrial injury. After examining Claimant in February, 2015, Dr. Orgel concretized his conclusions on causation, noting that her fall that could have caused the labral abnormality, as well as the greater trochanteric injury. Dr. Orgel opined this was clearly related to her injury and work-related. [Finding of Fact No. 49].

In addition, Dr. Sacha offered his opinion that the trochanteric symptoms and labral injury was caused by Claimant's fall. As a treating physician who treated the Claimant since April, 2013, Dr. Sacha had the opportunity to evaluate Claimant on multiple occasions. His opinion concerning the left hip labral tear and the cause of that tear was persuasive to the ALJ. Dr. Sacha's opinions regarding causation articulated on 11-18-14 are particularly apposite here, when he noted:

"[I]f the hip is being accepted as part of this Workers' Compensation claim and there is no medical data that support prior injuries or trauma that would cause this labral tear, then I would state that all hip pain and pathology would be related to this Workman's Compensation claim, the date of which is 12/27/12." [Finding of Fact No. 47].

Dr. Orgel's follow-up DIME specifically referenced and adopted those findings. Likewise, Dr. Bisgard's causation analysis concerning Claimant's hip was also persuasive. Respondent offered the opinion of Dr. O'Briean, who testified in the deposition that the hip and associate symptoms were not caused by Claimant's fall. Dr. O'Brien characterized the trachanteric and labral injuries as new diagnoses, however, there was no evidence that Claimant suffered a subsequent injury. Dr. O'Brien did not provide a credible explanation for Claimant's continuing symptoms in the hip. Likewise, Dr. Paz' opinion that the trochanteric injury was caused by the fall, but not the labral tear did not convince the ALJ that Dr. Orgel's were erroneous concerning the hip injury. Therefore, but the ALJ concludes that Claimant's fall on 12/27/12 was the cause of her hip injury, which included trochanteric bursitis and a labral tear.

Turning to the question of MMI, the ALJ notes that the evidence submitted by Respondent contrary to the DIME opinion on MMI did not rise to the clear and convincing evidence standard. Respondent offered the opinions of Dr. Paz and Dr. O'Brien, which were conflicting, but did not rise to the level that overcame Dr. Orgel's conclusions.

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 the Claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000).

Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). 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. Furthermore, 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).

In this case, the DIME physician (Dr. Orgel) opined that Claimant was not at MMI because she continued to require treatment for her hip condition. As part of his opinion, Dr. Orgel concluded that Claimant continued to require treatment for the left trochanteric bursitis, as well as the labral tear.

The ALJ finds the opinions of Dr. Orgel credible and persuasive. He examined the Claimant on two occasions and concluded she was not at MMI. After his first examination, Dr. Orgel felt that Claimant required an evaluation by an orthopedic surgeon, which Dr. Sacha also felt was reasonable. Dr. Orgel opined this could be completed before an MR arthrogram. [Finding of Fact No. 31]. There was no evidence submitted to ALJ that led to the conclusion that these recommendations were erroneous. After his second examination of the Claimant, Dr. Orgel provided a clear statement of his opinion on causation and also concluded that Claimant was not at MMI because she required further treatment. [Finding of Fact No. 49]. As the DIME physician, Dr. Orgel's opinions concerning MMI were entitled to deference, which comports with the holding of *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 and *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, *supra.*

His rationale was that because of the hip condition, Claimant required further treatment and/or diagnostic testing. Dr. Orgel's opinion was supported by Drs. Sacha and Bisgard. Specific evidence supporting Claimant's need for additional treatment (hip arthroscopy) was also provided by Drs. Motz and Johnson. Finally, Dr. Sacha specifically noted that if Claimant was to have the surgery, she would no longer be at MMI.

Respondent has not produced convincing evidence that is free from doubt on the question of MMI. As noted above, Dr. Orgel provided an explanation as to the basis of his opinions and had the opportunity to evaluate Claimant on two occasions. As found, Drs. Sacha and Bisgard concurred in Dr. Orgel's recommendations. The opinion of Respondent's experts constituted a difference of opinion. As determined in Findings of Fact 56 through 59, the Respondent failed to prove by clear and convincing evidence that the DIME physician was incorrect in determining the Claimant was not at MMI. Therefore, the ALJ concludes that Respondent failed to meet their burden of proof to establish that Dr. Orgel was incorrect in determining that Claimant had not reached MMI.

Since the ALJ concluded that Claimant is not at MMI, as found by Dr. Orgel, no finding is made concerning Claimant's permanent medical impairment.

Medical Benefits-Hip Arthroscopy

In the "Amended" Response to Application for Hearing (filed on or about April 28, 2015), Respondent cited W.C.R.P. Rule 16-10(E). However, ALJ notes that no evidence concerning a request for prior authorization or a denial of a request for prior

authorization was admitted into evidence at the hearing. Based upon Medical Treatment Guidelines, the proposed left hip arthroscopy would require prior authorization.

As noted above, the ALJ has concluded that a Claimant is not at MMI for her industrial injury. The weight of the evidence leads to the conclusion that Claimant requires arthroscopic repair of the labral tear in her left hip. First, the opinions of Dr. Sacha with regard to Claimant's need for this treatment is persuasive. Conservative treatment options with regard to the hip have been exhausted and therefore, the proposed hip surgery is required to cure and relieve the effects of Claimant's industrial injury.

Second, Dr. Johnson's opinions with regard to the proposed surgery persuaded the ALJ that it is reasonable and necessary.

However, the ALJ does not have a current request for authorization of the hip arthroscopy before him. Although there are references in the medical records that Claimant is desirous of this procedure, there was no testimony to this effect. Accordingly, the ALJ has determined that the authorization issue is not ripe at the present time.

ORDER

It is therefore ordered that:

1. As found by Dr. Orgel, Claimant is not at MMI for injuries suffered on 12-27-12.

2. Respondent shall provide reasonable and necessary medical treatment to Claimant, including the left hip arthroscopy proposed by Dr. Johnson if a request for authorization is made.

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: October 30, 2015

Digital signature

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

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of David Orgel, M.D. that she reached Maximum Medical Improvement (MMI) on January 8, 2015 with a 25% whole person impairment rating.

FINDINGS OF FACT

1. On August 26, 2013 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. She injured her lower back while lifting 50 pound retaining wall blocks.

2. Claimant received medical treatment for her lower back condition from various physicians. During the course of treatment Authorized Treating Physician (ATP) John Aschberger, M.D. referred Claimant to Mark C. Winslow, D.O. for osteopathic manipulation. On January 10, 2014 Claimant received a cane from Dr. Winslow's office because of her continuing lower back symptoms. By January 24, 2014 Claimant reported "[n]oticing that I have to put a lot of pressure on cane by the afternoon, just for balance in morning."

3. On June 27, 2014 Dr. Aschberger determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned an 18% whole person impairment rating for Claimant's lower back condition. Claimant remarked that she had added the designations of right wrist and right knee to her pain diagrams at Dr. Aschberger's office but he had failed to examine her right wrist. Dr. Aschberger did not note any right wrist complaints or assign any impairment rating for Claimant's right wrist.

4. Claimant testified regarding the development of a trigger condition in her right thumb in approximately 2011. She received a steroid injection that caused an infection and required surgery. Claimant noted that she recovered and did not experience wrist pain in connection with her thumb condition. She maintained that she did not suffer any right wrist symptoms prior to using a cane in connection with her admitted lower back injury.

5. On September 15, 2014 Claimant filed an Application for a Division Independent Medical Examination (DIME) challenging Dr. Aschberger's MMI and impairment determinations. The Application sought a DIME to evaluate Claimant's lower back, SI joints, pelvis, groin-hernia, right wrist pain from cane use and right knee pain from antalgic gait. The Application specified that "maintenance therapies" should be addressed by the DIME physician.

6. On October 15, 2014 Claimant visited personal medical provider Kaiser Permanente. She reported chronic back pain from her injury, "pain in the right wrist from cane" and a number of other symptoms.

7. On October 20, 2014 Claimant returned to Dr. Winslow for an evaluation. Dr. Winslow remarked that Claimant's primary complaint involved her lower back injury while working for Employer on August 26, 2013. He commented that she had not received any treatment from him since February 2014 and her overall symptoms remained relatively unchanged. Claimant did not mention any right wrist pain from cane use.

8. On January 8, 2015 Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant had reached MMI on the date of his examination. He assigned Claimant a 25% whole person impairment rating. The rating consisted of a 7% whole person impairment for her spine and 19% for range of motion deficits.

9. Claimant testified that she completed a pain diagram at the DIME noting symptoms in her lower back, right hip, right leg and right wrist. She explained that Dr. Orgel did not examine her right wrist and instead inquired about the history of her right thumb condition. Dr. Orgel reported that Claimant had a prior, severe infection of her right hand and thumb. He remarked that she had limited range of motion of her thumb "with pain in her right finger and into the thumb and wrist and radiating into her forearm and shoulder." Dr. Orgel noted that Claimant walked with a cane but did not note that Claimant had any right wrist symptoms. He limited medical maintenance benefits to psychological visits for chronic pain.

10. In his report Dr. Orgel commented that the medical records he had reviewed were "quite incomplete." He noted that he did not have the impairment rating performed by Dr. Aschberger or a copy of the original MRI. Dr. Orgel stated that Claimant reported "she has been seeing Dr. Winslow, and I don't have any information from him.

11. On February 27, 2015 Claimant returned to Dr. Aschberger for an examination. Dr. Aschberger noted that Claimant continued to experience soreness in her back but was again walking without her cane. He explained that prior to her Workers' Compensation injury she "had management for chronic pain for her right hand and thumb." She continues with irritation there as well, but that seems to be controlled with the Oxycodone."

12. On March 13, 2015 Claimant returned to Dr. Aschberger for an examination. He remarked that Claimant's lower back symptoms had improved with opioid management. The report does not mention any right wrist symptoms.

13. On April 10, 2015 Claimant returned to Kaiser for an evaluation. Erika L. Freebern, M.D. noted that Claimant had worsening right wrist pain from using her cane because of lower back pain. Dr. Freebern remarked that Claimant had been using the

cane for over one year and had developed right wrist symptoms approximately two and one-half to three months earlier. She diagnosed Claimant with possible DeQuervain's Tenosynovitis and referred her to orthopedics for an injection.

14. On May 1, 2015 Claimant returned to Dr. Aschberger for an examination. Claimant did not mention any right wrist symptoms.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel that she reached MMI on January 8, 2015 with a 25% whole person impairment rating. Claimant specifically asserts that Dr. Orgel did not address her right wrist symptoms. She contends that the symptoms arose from her use of a cane because of her August 26, 2013 lower back injury. Claimant maintains that she told Dr. Orgel about her right wrist symptoms but he did not examine her wrist.

16. Dr. Orgel reported that Claimant had a prior, severe infection of her right hand and thumb. He remarked that she had limited range of motion of her thumb "with pain in her right finger and into the thumb and wrist and radiating into her forearm and shoulder." Dr. Orgel noted that Claimant walked with a cane but did not mention any right wrist symptoms. He limited medical maintenance benefits to psychological visits for chronic pain. Dr. Orgel acknowledged that the medical records were incomplete because he lacked the impairment rating of Dr. Aschberger and the medical records of Dr. Winslow. However, the record demonstrates that Dr. Aschberger assigned Claimant an 18% whole person impairment rating for her lower back condition. Dr. Aschberger did not note any right wrist complaints or provide any impairment rating for Claimant's right wrist. Moreover, Claimant's only mention of her right wrist to Dr. Winslow occurred on January 24, 2014 when she noted pressure on her wrist from cane use. Finally, after Claimant's January 8, 2015 DIME with Dr. Orgel the medical records are devoid of any mention of right wrist symptoms until Claimant noted the development of right wrist pain approximately two and one-half to three months prior to her April 10, 2015 Kaiser visit.

17. Dr. Orgel reviewed Claimant's medical records, conducted a thorough physical examination and did not document any right wrist symptoms. Similarly, when Dr. Aschberger determined that Claimant had reached MMI he did not mention any right wrist complaints or assign any impairment rating for the wrist. Claimant has not presented persuasive evidence that Dr. Orgel failed to evaluate her wrist or deviated from the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Orgel's DIME determination was incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

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

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

and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel that she reached MMI on January 8, 2015 with a 25% whole person impairment rating. Claimant specifically asserts that Dr. Orgel did not address her right wrist symptoms. She contends that the symptoms arose from her use of a cane because of her August 26, 2013 lower back injury. Claimant maintains that she told Dr. Orgel about her right wrist symptoms but he did not examine her wrist.

8. As found, Dr. Orgel reported that Claimant had a prior, severe infection of her right hand and thumb. He remarked that she had limited range of motion of her thumb "with pain in her right finger and into the thumb and wrist and radiating into her forearm and shoulder." Dr. Orgel noted that Claimant walked with a cane but did not mention any right wrist symptoms. He limited medical maintenance benefits to psychological visits for chronic pain. Dr. Orgel acknowledged that the medical records were incomplete because he lacked the impairment rating of Dr. Aschberger and the medical records of Dr. Winslow. However, the record demonstrates that Dr. Aschberger assigned Claimant an 18% whole person impairment rating for her lower back condition. Dr. Aschberger did not note any right wrist complaints or provide any impairment rating for Claimant's right wrist. Moreover, Claimant's only mention of her right wrist to Dr. Winslow occurred on January 24, 2014 when she noted pressure on her wrist from cane use. Finally, after Claimant's January 8, 2015 DIME with Dr. Orgel the medical records are devoid of any mention of right wrist symptoms until Claimant noted the development of right wrist pain approximately two and one-half to three months prior to her April 10, 2015 Kaiser visit.

9. As found, Dr. Orgel reviewed Claimant's medical records, conducted a thorough physical examination and did not document any right wrist symptoms. Similarly, when Dr. Aschberger determined that Claimant had reached MMI he did not mention any right wrist complaints or assign any impairment rating for the wrist. Claimant has not presented persuasive evidence that Dr. Orgel failed to evaluate her wrist or deviated from the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Orgel's DIME determination was incorrect. *Compare In Re Lafont*, W.C. No. 4-914-378 (ICAP, June 25, 2015) (concluding that the claimant had overcome the DIME determination because the DIME physician had failed to perform an adequate examination and comply with *AMA Guides* based on an expert physician's opinion).

ORDER

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

1. Claimant has failed to overcome the DIME opinion of Dr. Orgel.

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: October 19, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that a proposed cervical MRI is reasonable and necessary and causally related to this claim; and

2. Whether Claimant proved by a preponderance of the evidence that proposed lumbar discography is reasonable or necessary.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered:

1. Claimant has a medical history of low back problems, including a 2010 back injury with radiation down his right leg from lifting heavy equipment, and a 2012 back injury for which he was in medical care, but he abandoned medical care, after being incarcerated.

2. Claimant worked as a material handler and builder for Employer. After being hired, Claimant was incarcerated for seven months, and on September 5, 2013, he was released from jail on work release.

3. On October 10, 2013, Claimant sustained a work-related injury while lifting a wall off of a conveyor line. Claimant reported low back pain, with radiating pain into his right leg. Claimant's thoracic pain started the day after his injury.

4. Following his injury on October 10, 2013, Claimant received medical care through Concentra, where he was usually seen by Dr. Kirk Nelson. Claimant's primary complaints were low back and mid-back pain. Dr. Nelson repeatedly documented that Claimant's effort on clinical examination was inconsistent, that Claimant's variable effort and pain complaints were out of proportion to clinical findings, and that Claimant moved better when he was not aware he was being observed. On December 3, 2013, Dr. Nelson referred Claimant for a lumbar MRI, and to Dr. John Aschberger for a physiatry evaluation. On December 4, 2013, Dr. Aschberger provided an assessment of low back pain with a suggestion of lumbar radiculitis. Dr. Aschberger also noted Claimant's seemingly excessive pain behaviors on examination.

5. On December 6, 2013, a lumbar MRI was obtained, and interpreted as showing a right paracentral disc protrusion mildly impinging the right SI nerve root at L5-S1, a left paracentral disc protrusion impinging the left L5 nerve root at L4-5, and lower lumbar mild spondylosis. On December 12, 2013, Dr. Aschberger reviewed the MRI findings, and he recommended a lumbar selective nerve root block.

6. After December 19, 2013, Claimant's care was transferred from Concentra to Dr. Rafer Leach, and, on January 6, 2014, Claimant started treating with Dr. Leach. Claimant's complaints that day were low back and mid-back pain. He did not complain of neck or upper extremity pain.

Cervical MRI Request

9. Between October 10, 2013 and January 8, 2015, Claimant's medical care focused on his low back and mid-back. Despite substantial medical documentation during that period, there is a paucity of references to neck issues.

10. On July 22, 2014, Dr. Leach identified "cervicalgia" as one of Claimant's diagnoses. Before that date, none of Claimant's workers' compensation providers diagnosed a cervical condition. On August 14, 2014, when Dr. Leach provided a medical recommendation summary, he made no mention of the neck condition. On September 25, 2014, when Dr. Leach issued a "Response to Insurance Independent Medical Examination," he made no reference to a neck condition. On November 11, 2014, Dr. Leach made no reference to a neck condition. On January 8, 2015, Dr. Leach noted Claimant had a pericervical muscular spasm, but he did not indicate what caused that issue. Dr. Leach never opined that the "cervicalgia" was related to the work injury.

11. Dr. Leach's associate, Dr. James Benoist, first diagnosed Claimant as having a cervical issue on August 8, 2014. Starting on August 8, 2014, Dr. Benoist identified "cervicothoracic pain" or "cervicalgia" in his assessments, but he never opined the cervical conditions were related to the work injury. He simply provided diagnoses without a causal explanation.

12. Dr. Benoist is now recommending a cervical MRI for Claimant's upper extremity paresthesias. Dr. Benoist first documented Claimant's complaint of upper extremity paresthesias on April 15, 2015, more than eighteen months after the work injury. Dr. Benoist has not opined that the upper extremity paresthesias are work injury related, nor has he explained why that condition or the proposed MRI should come under this claim.

13. After Dr. Benoist recommended the MRI, Respondents had Dr. Franklin Shih, Dr. Michael Janssen, and Dr. Brian Reiss review records, and provide opinions on the need for that MRI. On May 28, 2015, Dr. Janssen opined that the proposed MRI did not have a direct relation to the work injury. On July 7, 2015, Dr. Shih opined that Claimant's history was not consistent with a cervical injury, and even if it was, it would be difficult to make any specific treatment recommendation based upon MRI findings.

On July 27, 2015, Dr. Reiss opined that the cervical MRI was for conditions unrelated to the work injury. At hearing, Dr. Shih further explained his opinion that the proposed cervical MRI was not reasonable and necessary, as it was unlikely to provide any useful information for the treatment of the work injury related conditions, and because he could not relate the cervical condition to the work injury.

14. Claimant testified that he had hand numbness and tingling since one or two weeks after his work injury. Claimant's claim of having upper extremity numbness and tingling prior to April 2015 is not supported by the medical records, and the Administrative Law Judge does not find it credible.

15. There is an absence of persuasive evidence supporting Dr. Benoist's recommendation of a cervical MRI. Dr. Leach, Claimant's authorized treating physician, credibly testified that he would not recommend a cervical MRI, noting Claimant's issues are with his low back and mid-back. Drs. Shih, Reiss and Janssen persuasively opined that the proposed cervical MRI is for conditions not causally related to this claim, and that the MRI is not reasonable and necessary as it is unlikely to provide any useful information.

Lumbar Discogram

16. Claimant's complaints and treatment course have been focused on his low back and mid-back areas. Claimant's complaints are diffuse, non-physiologic, and include complaints of whole body pain in all levels of his spine, and both legs and arms. Because of his diffuse complaints, Claimant has obtained numerous injections, in numerous areas of his body.

17. Specifically, on January 15, 2014, Claimant received a right SI joint injection from Dr. Zimmerman. On February 7, 2014, Claimant received multiple trigger point injections (TPI) to his right trapezius, right iliocostalis thoracic, right levator, and right rhomboid areas, by Dr. Moorer. On March 21, 2014, Dr. Benoist administered right SI dorsal ligament and sulcus steroid injections and a right piriformis muscle injection. On April 4, 2014, Dr. Benoist administered TPIs in Claimant's thoracic musculature. On May 29, 2014, Dr. Leach administered additional TPIs to the perilumbar region, the right piriformis region, and the gluteal maximus region. On June 10, 2015, Dr. Kenneth Allan administered right L5-S1 and right S1 epidural steroid injections (ESI). On February 10, 2015, Claimant underwent bilateral T6-7, and T7-8 ESIs, again administered by Dr. Allan.

18. On August 4, 2014, Dr. Leach identified Claimant's pain complaints as being axial lumbar pain, right leg (radicular) pain, and axial thoracic pain. Dr. Leach suggested Claimant may have a multifactorial pain generator.

19. During his IME on August 26, 2014, Claimant notified Dr. Franklin Shih that each injection he had received through that date, regardless of the type or location, provided him with almost complete body pain relief. At hearing, Claimant confirmed that

all of the injections received to date, regardless of the type or location, provided him the same result of complete but temporary pain relief.

20. On August 26, 2014, Dr. Shih concluded that he "would not consider further injections to be reasonable and necessary given [Claimant's] positive response to injections in multiple different areas with reported near complete relief of all of his pain complaints with each of the injections. [He] would also be quite hesitant regarding any surgical plan given the nonspecific response to injections and nonspecific clinical presentation." Dr. Shih testified it is impossible for a medical provider to identify a pain generator based upon the patient reporting the same result from two completely different injections to different body parts.

21. On September 25, 2014, Dr. Leach issued a "Response to Insurance Independent Medical Evaluation", within which he indicated that in his opinion, pain generators had been identified, and they included Claimant's lumbar discs, lumbar nerve roots, and sacroiliac joint.

22. On October 23, 2014, Dr. Benoist recommended L3-4, L4-5, and L5-S1 provocative discography. Dr. Benoist noted the SI joint and piriformis region were secondary pain generators based upon Claimant's response to injections in those areas. Dr. Benoist rendered that opinion after previously opining the Claimant's response to the SI joint injection and piriformis injection led him to conclude those were Claimant's primary pain generators. Dr. Benoist changed his opinion concerning Claimant's primary pain generator. Since October 23, 2014, Dr. Benoist has continuously recommended discography.

23. On November 15, 2014, Dr. Robert Kleinman, a Level II accredited psychiatrist, issued a psychiatric report. Dr. Kleinman noted Claimant is not an accurate historian, he embellishes his history, he minimizes his past legal problems, and he has behavioral problems and substance use problems. Dr. Kleinman concluded Claimant cannot be relied upon to provide accurate information. Dr. Kleinman further opined that "[w]ith this history and his response to treatment thus far, and some nonspecific findings on examination, he is a poor surgical candidate."

24. On December 16, 2014, Dr. Nicholas Olsen provided a report regarding the proposed lumbar discogram. Dr. Olsen noted that Claimant "had inconsistent response to interventional procedures in the past that do not lead to a specific diagnostic pattern," which led Dr. Olsen to conclude that lumbar discography was not medically necessary.

25. On January 28, 2015, Dr. Brian Reiss, an orthopaedic spine surgeon, performed an IME. With regard to the proposed lumbar discogram, Dr. Reiss opined "I certainly would not be suggesting discograms, because one he is not a surgical candidate and two the results are unlikely to be definitive/reliable given his history." Dr. Reiss explained that Claimant's complaints were out of proportion and not well correlated with objective examination including radiological findings. Dr. Reiss opined

that as a surgeon, he "would suggest avoiding any invasive procedure in this gentleman."

26. On March 5, 2015, David Whatmore, Dr. Prusmack's physician assistant, obtained a history and recommended lumbar discography. Prior to that evaluation, Claimant filled out a face sheet and a pain diagram within which he provided an inaccurate and incomplete history with regard to the injections he received to date. Mr. Whatmore is a non-physician, whose discography recommendation was based upon incomplete information and is therefore not deemed credible.

27. On April 21, 2015, Dr. Shih reviewed interval medical records for care and evaluations since his August 2014 IME, and he recommended against lumbar discography and lumbar surgery, noting (1) Claimant's history and exam were more consistent with a pain syndrome, (2) the location of a pain generator and the degree it was contributing was indeterminate, (3) the prognosis with surgery in an ideal patient was guarded, but Claimant was not an ideal patient, (4) discography in a straightforward case was of limited use, and the Medical Treatment Guidelines (MTG) indicated that discography was rarely indicated, and extremely controversial, and (5) in this case, it is impossible to interpret a positive response to discography, noting that Claimant's response to all prior procedures would lead to different diagnostic conclusions.

28. On May 28, 2015, Dr. Michael Janssen, an orthopedic spine surgeon, issued a report noting that Claimant had a number of credibility issues (past behavior, illicit drug usage, longstanding smoking history), lumbar discography had limited usage, and that Claimant was not an ideal candidate for discography.

29. Surveillance was obtained of Claimant on several dates between March 30, 2015, and May 31, 2015, depicting Claimant smoking, bending, looking down and side to side, fixing a fence/gate with hand tools, carrying a bag of ice, crouching, squatting, picking up a child, and walking.

30. On July 7, 2015, Dr. Shih reported that he had reviewed the reports from Drs. Kleinman, Reiss and Janssen. Dr. Shih concurred with the opinions expressed by those experts. He also reiterated his concerns regarding any invasive procedure. The March and May 2015 surveillance was provided to Dr. Shih. In a report dated July 17, 2015, Dr. Shih noted that the video showed Claimant having normal daily motion with various activities, which was consistent with his presentation while not being examined, and inconsistent with activities when being examined.

31. On July 27, 2015, Dr. Reiss reported that he reviewed additional reports from Dr. Leach, Dr. Benoist, Dr. Prusmack's PA, Dr. Janssen, Dr. Shih, and the March and May 2015 surveillance. Dr. Reiss agreed with the continued denial of discography. Dr. Reiss documented his surveillance observations, and indicated "these video segments clearly demonstrate a patient functioning quite well without any observed pain behaviors. These findings on these video segments augment my opinion and conclusions."

32. Additional surveillance obtained of Claimant on June 19, 2015, and July 12, 2015 depicts Claimant carrying two five gallon buckets and a tool belt, lifting a child, carrying that child, lifting a swing set over a fence with another man, moving a small refrigerator with a dolly, helping move a piano with a dolly, smoking, fixing the fence/gate with hand tools, lifting the gate, bending, reaching, twisting, squatting, crouching, kneeling, looking down, turning his head from side to side, and carrying a large black trash bag, all without noticeable pain behaviors.

33. On July 29, 2015, Dr. Shih reported that he reviewed that surveillance, and that the video was remarkable for Claimant having fluid active range of motion without pain behaviors, which was consistent with his presentation when not being examined, but inconsistent with his presentation when examined. Dr. Shih stated that "[t]his would suggest a conscious effort to magnify his complaints."

34. Dr. Leach testified that he believes Claimant needs lumbar surgery, although he is not a surgeon, and he defers surgical opinions to spine surgeons. Dr. Leach testified that in his opinion, lumbar discography is reasonable to identify Claimant's pain generators, and provide stronger evidence of where Claimant's pain is coming from, to assist in surgical planning. Inconsistent with that testimony, however, Dr. Leach also opined that Claimant's pain generators have already been identified, and are in three entirely different areas - - Claimant's lumbar discs, his lumbar nerve roots and his SI joint - - all of which is based upon Claimant's positive diagnostic response to injections in each of those areas. Claimant has had injections in several other areas as well. Dr. Leach conceded that not even one of the numerous injections administered to date has resulted in a negative result, calling this "surgical disease," suggesting this result is explained by the fact that Claimant needs surgery. Dr. Leach's opinions regarding the pain generators being identified by virtue of prior injection results, and his conclusion that those results show Claimant to be a surgical candidate, are incredible, and unpersuasive.

35. Dr. Leach examined Claimant twice after July 22, 2014, and he had not seen Claimant clinically between January 8, 2015 and the hearing date. Dr. Leach did not review, or could not recall, most of the information generated from sources outside of his office, including the medical reports from Dr. Kleinman, Dr. Olsen, Dr. Reiss, Dr. Janssen, and Dr. Shih, or any of the 2015 surveillance. Dr. Leach's opinion that Claimant is a surgical candidate and that discography is reasonable and necessary to help to identify pain generators for surgery is not persuasive and therefore, rejected.

36. Dr. Shih is a Level II accredited PM&R physician who is a lecturer for the Division on issues varying between the upper extremities and the spine. Dr. Shih is familiar with the MTGs utilized in workers' compensation in Colorado. Dr. Shih confirmed that since his original IME, he had reviewed additional records from Dr. Leach, Dr. Benoist, Dr. Allan, Mr. Whatmore (Dr. Prusmack's PA), Dr. Kleinman, Dr. Olsen, Dr. Reiss, and Dr. Janssen, as well as the surveillance of Claimant. Dr. Shih's opinions, when compared to those of Dr. Leach, are based upon a more thorough review of available information and documentation.

37. Dr. Shih testified that lumbar discography is done when the provider is suspicious there is a predominant disc pain generator, after the provider has already decided the patient is a surgical candidate, to help nail down the levels of surgery. If the patient is not a surgical candidate, discography is not reasonable or necessary. Dr. Shih confirmed the information contained in the MTGs on lumbar discography, that discography is rarely indicated, extremely controversial, and has a significant false positive rate. Dr. Shih also indicated medical providers are moving away from discography as a useful diagnostic tool for those reasons, and because the medical community is moving away from fusions for discogenic pain.

38. Dr. Shih opined that lumbar discography is not even a good test in an ideal patient, and he explained in detail that Claimant is not an ideal patient for numerous reasons, including his diffuse whole body pain, his inexplicable positive response to all prior injections, his smoking history, his numerous psychosocial factors, and the contrast between his clinical presentation and his functional ability when he is observed while not being examined.

39. Dr. Shih opined Claimant is not a surgical candidate, and performing surgery on this Claimant either with the benefit of discography, or without the benefit of discography, would not be recommended. Dr. Shih's opinions are consistent with the opinions of Dr. Kleinman, Dr. Olsen, as well as two spinal surgeons, Dr. Reiss and Dr. Janssen. For the reasons outlined by Drs. Kleinman, Olsen, Janssen and Shih, Claimant is not a lumbar surgical candidate. As Dr. Shih articulated, if Claimant is not a surgical candidate, lumbar discography is not reasonable and necessary. The opinions of Drs. Kleinman, Olsen, Janssen and Shih are credible, and persuasive. It is found that lumbar discography is unreasonable and unnecessary.

CONCLUSIONS OF LAW

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

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

3. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 204). 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.

4. 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 K*roupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

5. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. Section 8-42-101 C.R.S.; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-42-101, C.R.S.; See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Where liability for a particular medical benefit is contested, the claimant must prove that it is reasonably necessary to treat and is causally related to the industrial injury. *Id.*; See *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). The record must distinctly reflect that the medical treatment was necessary and designed to cure or relieve the effects of the work injury. *Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.,* 979 P.2d 584, 585 (Colo. Ct. App. 1999). Whether services are medically necessary for treatment of a claimant's injuries or incidental to obtaining such treatment is a question of fact to be determined by the ALJ. *Bellone v. Indus. Claim Appeals Office of the State,* 940 P.2d 1116 (Colo. Ct. App. 1997).

Proposed Cervical MRI is Not Reasonable, Necessary, nor Causally Relate

6. The first issue for the ALJ's determination is whether Dr. Benoist's proposed cervical MRI for Claimant's progressive upper extremity paresthesias is reasonable or necessary and related to this claim. Following his work injury, and prior to July 22, 2014, Claimant had only an occasional documented complaint of neck stiffness, which was never related by his providers to this claim. After July 22, 2014, Claimant was provided with "cervicalgia" as a diagnosis, but, again, that condition was never related by his providers to this claim. Claimant's bilateral upper extremity paresthesias were first documented eighteen months after his work injury, and have never been causally related to his claim.

7. Dr. Leach, Claimant's authorized treating physician, credibly testified that he would not argue for a cervical MRI, noting Claimant's issues are with his low back and mid-back. Drs. Shih, Reiss, and Janssen have all persuasively opined that the

proposed cervical MRI is for conditions not causally related to this claim, and that the MRI is also not reasonable or necessary as it is unlikely to provide any useful information. The Administrative Law Judge has accepted these opinions and Claimant's request for the cervical MRI is denied.

Proposed Lumbar Discogram is Not Reasonable and Necessary

8. As found, Claimant has failed to meet his burden of proof that lumbar discography is a reasonable or necessary. As found, for the reasons outlined by Drs. Kleinman, Olsen, Janssen and Shih, Claimant is not a lumbar surgical candidate, making lumbar discography unreasonable and unnecessary.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The medical benefit requested by Claimant of a proposed cervical MRI prescribed by Dr. Benoist is denied.

2. The medical benefit requested by Claimant of a proposed lumbar discogram prescribed by Dr. Benoist is denied.

3. All other issues not determined 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: _October 15, 2015_____

DIGITAL SIGNATURE:

Margot W. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-939-675-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 30, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/30/15, Courtroom 4, beginning at 8:30 AM, and ending at 9:30 AM).

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. The Respondents offered no exhibits.

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 October 7, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns average weekly wage (AWW). The issues of temporary total disability (TTD) benefits and termination for cause are stricken without prejudice.

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:

1. The Claimant sustained an admitted injury to his low back and right shoulder on January 12, 2014, while putting chains on a tractor.

2. The Respondents filed a General Admission of Liability (GAL) on January 29, 2014, which admitted to medical benefits and ongoing TTD benefits from January 13, 2014 at a rate of $546.16 per week or $78.02 per day, based on an admitted AWW of $819.20. In admitting an AWW, the adjuster used the hourly rate of $20.48 and failed to take into account the "health and welfare" add-on of $4.78 an hour, whereby the actual AWW totals $25.26 an hour, which the ALJ finds is the correct hourly rate.

3. The Respondents filed an amended GAL on April 28, 2014, which admitted to TTD benefits between January 13, 2014 and January 29, 2014.

4. The Claimant testified at hearing he worked 60-70 hours per week and earned $25.26 per hour. His testimony concerning the number of hours per week worked is refuted by the documentary evidence offered by the Claimant (Claimant's Exhibit 2). Consequently, the ALJ finds that his testimony concerning work of 60-70 hours per week is not credible. The wage records support an hourly rate of $25.26 and the Claimant's testimony in this regard is credible.

5. The wage records presented at hearing reflect that the Claimant worked an average of 40 hours per week and earned $25.26 per hour (Claimant's Exhibit 2), and the ALJ so finds.

6. The Claimant's AWW is hereby established at $1,010.40, which yields a TTD rate of $673.60 per week or $78.02 per day.

7. The Claimant is entitled to 17 days of TTD benefits, as admitted in the Respondents' April 28, 2014 GAL.

8. The Claimant is entitled to $1,635, 91 in TTD benefits for the period admitted in the April 28, 2014 GAL. The Claimant already received $1,326.39 in TTD benefits. Therefore, the Claimant is owed the differential of $309.50 in TTD benefits.

Ultimate Findings

9. The ALJ finds the wage records admitted into evidence more persuasive and credible than the Claimant's testimony regarding the number of hours per week worked (*See* Claimant's Exhibit 2). Therefore, as found herein above, the Claimant's AWW is $1,010.40, which yields a TTD rate of $673.60 per week or $78.02 per day.

10. The ALJ makes a rational decision to resolve the conflict between the Claimant's testimony on hours worked in favor of the documentary evidence and against the Claimant's testimony.

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; 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 wage records admitted into evidence were more persuasive and credible than the Claimant's testimony regarding the number of hours per week worked.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational decision to resolve the conflict between the Claimant's testimony on hours worked in favor of the documentary evidence and against the Claimant's testimony.

Average Weekly Wage (AWW)

c. Section 8-42-102 (2), C.R.S., provides that in the case of hourly employees, AWW should be determined by multiplying the number of hours worked during a week times the hourly rate. As found, the Claimant's AWW is $1,010.40, which yields a TTD rate of $673.60 per week or $78.02 per day.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proving that his AWW is $1,010.40.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the Claimant benefits based on an average weekly wage of $1,010.40, which yields a temporary total disability benefit rate of $673.60 per week or $78.02 per day.

B. The Respondents shall pay the Claimant, based on $1,635, 91 in temporary total disability benefits for the period admitted in the April 28, 2014 General Admission of Liability. The Claimant already received $1,326.39 in TTD benefits. Therefore, the respondents shall pay the Claimant the differential of $309.50 in temporary total disability benefits, retroactively and forthwith

C. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

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

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

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant prove by a preponderance of the evidence that medical services provided by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 were reasonable and necessary to cure and relieve the effects of the industrial injury?

- Are Respondents entitled to an order finding that any future treatment provided by Dr. Kawasaki will be unreasonable and unnecessary, or is this issue not ripe for determination?

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 and 2 were received in evidence. Respondents' Exhibits A through F and H through U were admitted in evidence. Respondents' Exhibit G page 35 was admitted without objection. The remainder of Exhibit G (pages 36 through 47) was excluded subject to foundation. Exhibit G pages 36 through 47 was never reoffered and was never admitted into evidence.

2. On February 4, 2014 Claimant sustained an industrial injury when she fell and cut her left hand.

3. On March 12, 2014 Insurer filed a General Admission of Liability (GAL) admitting liability for temporary total disability benefits and medical benefits.

4. Shortly after the accident claimant began authorized medical treatment with Concentra.

5. In March 2014 Claimant underwent surgery described as a left ring finger distal nerve repair. The surgery was performed by Kavi Sachar, M.D.

6. Following surgery Claimant continued to experience problems with her left hand. These problems included hypersensitivity in the ulnar aspect of the ring finger and radial aspect of the small finger, swelling and some darkness and hypersensitivity of the skin. Dr. Sachar referred Claimant to Robert Kawasaki, M.D., for a physical medicine consultation regarding these problems.

7. Dr. Kawasaki first examined Claimant on April 29, 2014. Dr. Kawasaki referred the Claimant for a thermogram to rule out complex regional pain syndrome

(CRPS). He also advised Claimant to continue physical therapy and prescribed Percocet.

8. On June 3, 2014 Dr. Kawasaki noted the thermogram was positive for CRPS. He advised Claimant that this was a condition that needed to be treated aggressively. Dr. Kawasaki recommended Claimant undergo a stellate ganglion block (SGB) and continue with her medications including a compounding cream, gabapentin and Percocet. Dr. Kawasaki referred Claimant to John Sacha, M.D., to perform the SGB.

9. Dr. Sacha performed an SGB on July 24, 2014. On August 12, 2014 Dr. Kawasaki noted the Claimant's symptoms improved after the SGB.

10. At some point John Burris, M.D., began to treat Claimant at Concentra.

11. On September 26, 2014 Dr. Kawasaki referred Claimant for another SGB.

12. On October 15, 2014 Dr. Burris examined Claimant at Concentra. Dr. Burris wrote that Claimant had been referred to him "for delayed recovery issues regarding her left hand complaints." Dr. Burris noted Claimant had a diagnosis of CRPS but stated that "clinically there are no manifestations of this on today's evaluation." Dr. Burris stated Claimant had an "administrative type job" and opined she could return to work in that job.

13. On October 15, 2014 Dr. Burris authored a second note stating that upon discharge Claimant "took issue with being released to full work activities" and requested to have her restrictions reassigned. Dr. Burris imposed restrictions of "sedentary work with a maximum 2-handed lift of 10 pounds." Dr. Burris opined Claimant demonstrated "clear secondary gain" and psychosomatic overlay. Dr. Burris noted he offered Claimant a "possible change of provider." He further stated that he wanted Claimant to continue her follow-up with Dr. Kawasaki.

14. On November 18, 2014 Dr. Kawasaki reported that Claimant had a good response to the second SGB. Dr. Kawasaki also noted that Claimant stated that Dr. Burris wanted Dr. Kawasaki to "take over" Claimant's medication. However, Dr. Kawasaki stated that he would not prescribe oxycodone on November 18 because Claimant declined to undergo a urine toxicology test. Dr. Kawasaki continued the prescription of topical cream and also prescribed occupational therapy (OT). He also referred Claimant to Dr. Sacha for a third SGB.

15. On December 8, 2014 Claimant applied for a hearing and endorsed the issue of "authorized provider."

16. Claimant testified that she applied for a hearing because she wanted to accept the change of physician offered by Dr. Burris.

17. On December 16, 2014 Dr. Kawasaki stated that Claimant would undergo a urine toxicology test and sign an opioid agreement. Dr. Kawasaki advised the Claimant of the "dangers" of oxycodone and stated Claimant would be kept on a "low dose." Dr. Kawasaki also prescribed Lyrica, a topical cream and OT. He continued the restrictions imposed by Dr Burris.

18. On February 10, 2015 Claimant reported to Dr. Kawasaki that she had the third SGB "with good success." However, her pain was returning. On examination Dr. Kawasaki noted hypersensitivity along the index finger, continued swelling in the hand and "mild discoloration" of the hand. Dr. Kawasaki stated the Claimant's "final option" might be to undergo a stellate ganglion radiofrequency neurotomy (RF procedure). He indicated he would request authorization to perform the RF procedure.

19. On February 18, 2015 Floyd Ring, M.D., conducted a paper review of the RF procedure proposed by Dr. Kawasaki. Dr. Ring recommended that the request for authorization be denied because there was insufficient documentation of Claimant's response to the SGB procedures.

20. On March 17, 2015 Dr. Kawasaki noted that based on Dr. Ring's opinion the Insurer had denied authorization for the RF procedure. Dr. Kawasaki stated that Claimant had brought in her "pain diaries" and these documents showed that after the first day of each SGB she had very little pain the hand. Dr. Kawasaki continued to recommend the RF procedure and stated he would appeal the denial.

21. A hearing was set for March 24, 2015 to determine the issues raised by Claimant's December 2014 Application for Hearing. However, on March 19, 2015 the parties submitted a Stipulation and Motion for Approval. This motion advised that the parties had "agreed to designate Greg Reichhardt, M.D., as Claimant's authorized treating physician (ATP)" and that they further agreed Dr. Kawasaki was "also authorized." The Claimant agreed that the stipulation resolved all issues indorsed in the December 8, 2014 Application for Hearing and that the scheduled hearing could be vacated.

22. On March 23, 2015 the ALJ signed an Order granting the parties' stipulation and motion for approval. The order provided that Claimant's ATP "from this date forward for this claim shall [sic] Greg Reichhardt, M.D." and that "Robert Kawasaki M.D. is also an authorized provider for this claim."

23. On April 9, 2015 Claimant filed an Application for Hearing and endorsed the issues of "medical benefits" and "reasonably necessary." On May 11, 2015 Respondents filed a Response to Application for Hearing and endorsed numerous issues including "reasonableness, necessity and relatedness of any and all medical care sought and/or received."

24. On April 14, 2015 Dr. Kawasaki noted Claimant had increasing pain in the left upper extremity and indicated that she was "regressing." Dr. Kawasaki stated he was still trying to get authorization for the RF procedure but Insurer had denied the

request “based on a peer review” by Nicolas Olsen, D.O. Dr. Kawasaki stated that he would refer the Claimant for another SGB and additional OT for “edema control and stress loading.” Dr. Kawasaki also continued the prescription for the “compounding cream” and noted Claimant did not need a refill of her opioid medication because she was “trying to cut back.” Dr. Kawasaki stated he would see Claimant for follow-up in four weeks.

25. On April 14, 2015 Dr. Kawasaki also wrote that Claimant was being “transferred to Dr. Reichhardt.” Dr. Kawasaki advised Claimant he would “not have much of a role” in her treatment “as Dr. Reichhardt is a physiatrist.” The Claimant advised Dr. Kawasaki that she wanted to keep him involved in her treatment. Dr. Kawasaki noted that this “would need to be straightened out.”

26. On April 29, 2015 Dr. Reichhardt, who is board certified in physical medicine and rehabilitation as well as elctrodiagnostic medicine, examined Claimant for the first time. Dr. Reichhardt took a history, performed a physical examination and reviewed Claimant’s medical records. Dr. Reichhardt noted Claimant was scheduled for another SGB and opined that this was “reasonable.” He also noted Claimant was getting medications from Dr. Kawasaki and stated that after a more thorough review of these medications he “would determine whether other medication trials might be indicated.” Dr. Reichhardt noted the Medical Treatment Guidelines indicate that the RF procedure is not “generally accepted or widely used” to treat CRPS and that he lacked experience with the procedure. Consequently, Dr. Reichhardt referred Claimant to Scott Hompland, D.O., to obtain a second opinion “from an anesthesiologist experienced in treating CRPS.” Dr. Reichhardt sent a copy of this note to Dr. Kawasaki.

27. Dr. Reichhardt examined Claimant on May 13, 2015. He noted Claimant continued to have pain in the left hand and was taking one to two tablets of oxycodone per day and also using a pain cream. Dr. Reichhardt opined that if Claimant received “significant benefit” from the next SGB it would be reasonable to do another course of OT.

28. Dr. Kawasaki examined the Claimant in “follow-up” on May 26, 2015. Dr. Kawasaki noted Claimant had undergone a fourth SGB on May 14, 2015 and she reported it worked well. Dr. Kawasaki also noted Claimant had seen Dr. Reichhardt who was “taking over as her primary care physician.” Dr. Kawasaki also noted Dr. Reichhardt had referred Claimant to Dr. Hompland. Claimant was occasionally using oxycodone and needed to refill the medication. She was also using “topical medications.” Dr. Kawasaki refilled the medications. Dr. Kawasaki advised Claimant that Dr. Reichhardt was now her primary care physician and also a physiatrist. Dr. Kawasaki wrote that the services he was providing and those being provided by Dr. Reichhardt were “somewhat redundant.” Claimant told Dr. Kawasaki that she wanted to continue to see him and Dr. Kawasaki wrote that he had “no problem” with seeing Claimant “as long as it is okay with Dr. Reichhardt.”

29. On May 27, 2015 Dr. Hompland examined the Claimant. Dr. Hompland reviewed various treatment options, including the proposed RF procedure. Dr.

Hompland recommended treatment by maximizing “medical management” but noted Claimant was “quite opposed” to that approach.

30. Dr. Reichhardt examined Claimant on May 27, 2014. Claimant reported she had a “good visit” with Dr. Hompland and that they had discussed “other medications” including antidepressants. Dr. Reichhardt discussed the possibility of prescribing Cymbalta but Claimant wanted to “think about” this option. Dr. Reichhardt sent a copy of this note to Dr. Kawasaki.

31. Dr. Reichhardt examined Claimant on June 10, 2015. Claimant reported that she received pain relief from the most recent SGB but the effects of the injection had worn off and subsequently her pain had increased. Dr. Reichhardt discussed Dr. Hompland’s report with Claimant. Claimant agreed to a trial of Cymbalta. Dr. Reichhardt sent a copy of this note to Dr. Kawasaki.

32. Dr. Kawasaki examined the Claimant in “follow-up” on June 23, 2015. Dr. Kawasaki noted that he was waiting to see Dr. Hompland’s second opinion evaluation. He stated that Claimant remained on an opioid management protocol and was to continue with oxycodone. Dr. Kawasaki noted that claimant was experiencing side effects from the use of Cymbalta prescribed by Dr. Reichhardt. However, Dr. Kawasaki did not alter this medication because Claimant was scheduled to visit Dr. Reichhardt the following day. Dr. Kawasaki stated that he would see the Claimant for follow-up in four weeks. Dr. Kawasaki sent a copy of this report to Dr. Reichhardt.

33. Dr. Reichhardt examined Claimant on June 24, 2015. Claimant was reportedly “doing about the same” as she was before. She was taking and tolerating Cymbalta. She was also using pain cream three times per day and taking oxycodone as needed. Dr. Reichhardt recommended “repeating the block one more time w33ith therapy pre-scheduled to start as soon after the block as feasible.” Dr. Kawasaki sent a copy of this report to Dr. Reichhardt.

34. Dr. Ring testified at the hearing. Dr. Ring is level II accredited and is an expert in pain management. Dr. Ring testified that Dr. Kawasaki and Dr. Reichhardt are both specialists in physical medicine and rehabilitation. Dr. Ring opined that the treatments being provided by Dr. Kawasaki and Dr. Reichhardt are redundant. Dr. Ring opined that the Claimant needs a primary care doctor who acts as a “gatekeeper.” Dr. Ring further opined the “gatekeeper” should probably specialize in occupational medicine.

35. Dr. Ring opined it is not reasonable and necessary for the Claimant to be treated by two physiatrists at the same time. He explained that it might be appropriate for two physiatrists to treat a single patient if one of the physiatrists was limited to offering a one-time “second opinion.”

36. Dr. Ring opined that when the Claimant treats with two physicians at the same time there is a potential “pharmacological disaster” if the physicians are not consulting one another.

37. Claimant testified that she did not schedule any of her appointments with Dr. Kawasaki. Rather, Dr. Kawasaki scheduled appointments with her. At hearing Claimant testified that she did not have any future appointments scheduled with Dr. Kawasaki. She explained that she had cancelled an appointment that Dr. Kawasaki scheduled subsequent to June 23, 2015 because she was satisfied with the treatment recommendations of Dr. Reichhardt and Dr. Hompland.

38. Claimant testified that Dr. Kawasaki has prescribed oxycodone and topical creams. Claimant testified that she has benefited from these medications.

39. Claimant proved it is more probably true than not that the services provided by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 10, 2015 were reasonable and necessary to cure and relieve the effects of her injury-related CRPS.

40. Claimant credibly testified that the April 14, 2015, May 26, 2015 and June 23, 2015 appointments were scheduled by Dr. Kawasaki and not by her. By April 14, 2015 Dr. Kawasaki had been an authorized treating physician for more than a year. During that year Dr. Kawasaki rendered or prescribed numerous treatments including therapy, narcotic medications, topical medications and referrals for injections. Dr. Reichhardt became authorized to treat the Claimant by order of March 23, 2015. However, Dr. Reichhardt did not examine Claimant until April 29, 2015. In these circumstances it was not unreasonable for Claimant to attend the April 14 appointment scheduled by her long time authorized treating physician, Dr. Kawasaki. It was not until the April 14, 2015 visit that Dr. Kawasaki raised with Claimant the possibility that his treatment might become "redundant" in light of Dr. Reichhardt's designation as an authorized provider. Moreover, Claimant credibly testified that she benefited from the compounding cream that Dr. Kawasaki prescribed on April 14, 2015. From these facts the ALJ finds that the treatment rendered on April 14, 2015 was reasonable and necessary and was in no way "redundant" to any treatment provided by Dr. Reichhardt.

41. The services provided by Dr. Kawasaki on May 26, 2015 were reasonable and necessary to cure and relieve the effects of the CRPS. By May 26, 2015 Claimant had seen Dr. Reichhardt on at least two occasions. On April 29, 2015 Dr. Reichhardt was aware that someone (presumably Dr. Kawasaki) had referred Claimant for another SGB. Dr. Reichhardt opined that this referral was "reasonable." On May 13, 2015 Dr. Reichhardt noted that Dr. Kawasaki was continuing to prescribe medications including oxycodone and a topical cream. However, Dr. Reichhardt voiced no objection to Dr. Kawasaki's prescriptions. Rather, on April 19, 2015 Dr. Reichhardt noted that he would review Claimant's records and determine whether other medication trials might be indicated. Claimant credibly testified that she benefited from the compounding cream and narcotic medication prescribed by Dr. Kawasaki on May 26, 2015. From these circumstances the ALJ infers that Dr. Reichhardt considered it appropriate for Claimant to continue to see Dr. Kawasaki and for Dr. Kawasaki to prescribe medications to treat the CRPS.

42. The services provided by Dr. Kawasaki on June 23, 2015 were reasonable and necessary to cure and relieve the effects of the Claimant's CRPS. On June 23,

2015 Dr. Kawasaki continued to prescribe oxycodone under the "opioid management protocol." Claimant credibly testified that she benefited from this medication. There is no credible or persuasive evidence that Dr. Reichhardt disagreed with the prescription for oxycodone or expressed the view that Dr. Kawasaki was acting inappropriately when he prescribed the drug. Rather, on June 24, 2015 Dr. Reichhardt again noted Claimant was using oxycodone and a "pain cream." However, Dr. Reichhardt did not voice any disagreement with these prescriptions or Dr. Kawasaki's continued participation in Claimant's treatment. The ALJ infers from this evidence that by June 23, 2015 Dr. Kawasaki was not providing services that were purely redundant to those rendered by Dr. Reichhardt. Rather, the ALJ finds that the two physicians were providing related services on an informed and cooperative basis.

43. The ALJ is not persuaded by the views of Dr. Ring insofar as he expressed the opinion that because Dr. Reichhardt and Dr. Kawasaki are both physiatrists the treatments they render are "redundant" and therefore unreasonable and/or unnecessary.

44. As determined in Finding of Fact 42, the evolution of Claimant's treatment provided after Dr. Reichhardt's March 23, 2015 designation as an ATP has demonstrated a cooperative division of labor between Dr. Reichhardt and Dr. Kawasaki On April 14, 2015 Dr. Kawasaki expressly recognized that Claimant's care was "transferred" to Dr. Reichhardt. On May 26, 2015 Dr. Kawasaki indicated that, although the treatment he provided was "somewhat" redundant to that of Dr. Reichhardt he would continue to treat Claimant if it was "okay" with Dr. Reichhardt. Thus, the ALJ infers that Dr. Kawasaki recognizes Dr. Reichhardt as the "gatekeeper" in this case and that he provides treatment at Dr. Reichhardt's discretion. After his appointment as ATP Dr. Reichhardt was aware that Dr. Kawasaki continued to examine Claimant and provide treatment recommendations and services including topical cream and the management of Claimant's opioid usage. While Dr. Reichhardt provided various treatment recommendations of his own, including the referral to Dr. Hompland, he never indicated or opined that it was improper or "redundant" for Dr. Kawasaki to continue prescribing medications and managing the opioid usage. Dr. Reichhardt did not opine that it was unreasonable and/or unnecessary for Dr. Kawasaki to continue providing services. The ALJ infers from this series of events that, in the words of Dr. Kawasaki, the treatment responsibilities of the two physicians has been "straightened out."

45. The ALJ is not persuaded by Dr. Ring's opinion that allowing Dr. Kawasaki to manage some of Claimant's medications is unreasonable or unnecessary because it offers the prospect of a "pharmacological disaster." Dr. Ring himself acknowledged that both Dr. Kawasaki and Dr. Reichhardt are board-certified physicians "capable of managing medications." The ALJ infers from this acknowledgment that Dr. Kawasaki is fully aware of drug interactions, overdoses and other complications that may arise where a patient is being prescribed medications by more than one physician. Indeed, it appears that Dr. Kawasaki was demonstrably conscious of these potential difficulties on June 23, 2015 when he instructed Claimant to continue taking Cymbalta prescribed by Dr. Reichhardt despite Claimant's complaints about side effects. Instead of altering the

prescription Dr. Kawasaki deferred to Dr. Reichhardt who was scheduled to see Claimant the next day. Moreover, the ALJ infers the risks arising when a claimant is treated by more than one physician are not limited to the situation where the physicians share the same specialty. Rather, these risks arise in all cases where a claimant is treated by more than one physician. The ALJ finds that management of this risk is best left to the exercise of professional skill and judgment by the physicians involved in the individual case.

CONCLUSIONS OF LAW

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

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

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

REASONABLENESS AND NECESSITY OF VISITS TO DR. KAWASAKI

Respondents argue that Claimant failed to prove that her visits to Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 constituted "reasonable and necessary" medical treatment. To the contrary the respondents argue the evidence establishes that the treatment provided by Dr. Kawasaki on these dates was "redundant" to that provided by Dr. Reichhardt. In support of this view Respondents cite the opinions of Dr. Ring as well as Dr. Kawasaki's statement that the services he was providing were "somewhat redundant" to those provided by Dr. Reichhardt.

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).

As determined in Findings of Fact 39 through 45 Claimant proved it is more probably true than not that the medical treatment provided by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 was reasonable and necessary to cure and relieve the effects of the industrial injury. As found, Dr. Kawasaki provided services that included the prescription of topical cream and the management of Claimant's use of opioid medication. Claimant credibly testified that these services were beneficial to her. As determined in 44 through 46 the ALJ is not persuaded that the services rendered by Dr. Kawasaki on these dates were unreasonable and/or unnecessary because they were "redundant" and presented an unacceptable risk of medication mismanagement.

The respondents concede that Dr. Kawasaki is legally "authorized" to provide treatment. Because the treatments rendered by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 are found to be reasonable and necessary the Insurer is liable to pay for these treatments.

RIPENESS OF REQEUST FOR ORDER FINDING FUTURE CARE BY DR. KAWASAKI TO BE UNREASONABLE AND UNNECESSARY

Respondents request that the ALJ enter an order finding that "additional medical care provided by Dr. Kawasaki is not reasonable and necessary." In support of this request Respondents reiterate their argument that any treatment provided by Dr. Kawasaki is and will be "redundant" to that provided by Dr. Reichhardt. Claimant argues, among other things, that Respondents' request for an order determining that future treatment provided by Dr. Kawasaki will not be "reasonable and necessary" is "speculative." Claimant reasons that to issue such an order would be premature because no future treatment by Dr. Kawasaki has been "recommended or even sought." Although Claimant's position statement does not tether this argument to a specific legal theory, the ALJ understands Claimant to be asserting that the issue raised by Respondents is not legally "ripe" for determination. The ALJ agrees with Claimant's position.

Generally, the term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication." Our courts have held that under this doctrine adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur. *Youngs v. Industrial Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012); *Franz v. Industrial Claim Appeals Office,* 250 P.3d 1284 (Colo. App. 2010); *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006) (holding claim for permanent total disability is ripe for adjudication when respondents file FAL admitting for permanent impairment). In determining ripeness of an issue courts have considered the hardship to the parties if adjudication is withheld. In addition, courts consider whether the issue is fit for adjudication in the sense that there is an adequate record to permit effective review. *Stell v. Boulder County Department of Social Services,* 92 P.3d 910 (Colo. 2004).

Of course there is a distinction between sufficiency of the evidence to prove a fact in issue and the "ripeness" of the issue. An issue may be "ripe" in the sense that there is no "legal impediment" to its determination even though a party lacks sufficient evidence to prove the issue. The issue of ripeness is not to be confused with the question of whether an issue is groundless and frivolous. *See McMeekin v. Memorial Gardens,* WC 4-384-910 (ICAO September 30, 2014).

The ALJ has only such jurisdiction as is created by the provisions of the Workers' Compensation Act (Act). *Lewis v. Scientific Supply Co., Inc.,* 897 P.2d 905 (Colo. App. 1995). The ALJ notes that several provisions of the Act imply that an ALJ does not have statutory jurisdiction to enter orders concerning issues that are not "ripe" for hearing. Section 8-43-211(2)(b), C.R.S., provides the OAC shall set a hearing within one hundred twenty days after "any party requests a hearing on issues ripe for adjudication by filing a written request." Section 8-43-211(3), C.R.S., provides that if "an attorney requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time such request or filing is made" the attorney may be assessed reasonable fees and costs incurred by the opposing party when preparing for the hearing. Section 8-43-203(2)(b)(II)(A), C.R.S., requires a party to object to an FAL and file an application for hearing on disputed issues "that are ripe for hearing" or accept closure of such issues. *See Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004). Most importantly, § 8-43-207(1), C.R.S., grants an ALJ authority to conduct hearings "to determine any *controversy* concerning any issue arising under articles 40 to 47 of this title." (Emphasis added).

Moreover, our courts have held that the doctrine of "ripeness" applies in workers' compensation proceedings. In *BCW Enterprises v. Industrial Claim Appeals Office,* 964 P.2d 533 (Colo. App. 1997) the court of appeals held that the doctrine of "ripeness" precluded an ALJ from considering the issue of penalties against an insurer for filing an allegedly frivolous appeal while that appeal was still pending in the court system. Similarly, in *Youngs v. Industrial Claim Appeals Office*, *supra*, the court held that a petition to reopen a claim for permanent total disability benefits was not ripe while the direct appeal from the denial of the claim was still pending.

It follows that a "controversy concerning any issue arising under the Act" that justifies a hearing under § 8-43-207(1), refers to a "ripe" issue. If the issue is not "ripe" it does not present a "controversy" sufficient to trigger the ALJ's statutory jurisdiction to conduct a hearing and decide the issue.

Here, the ALJ concludes that Respondents' request to enter an order finding that any future treatment rendered by Dr. Kawasaki would be unreasonable and unnecessary is not "ripe" for determination. This is true because the ALJ does not know, and cannot determine what specific treatment Dr. Kawasaki may recommend or render in the future. Consequently, any ruling that such hypothetical treatment would be "redundant" to treatment provided by Dr. Reichhardt does not present a real and immediate controversy that is fit for adjudication.

Respondents have admitted liability for reasonable and necessary medical benefits to treat Claimant's industrial injury. Consequently they are bound by that admission and must provide treatment accordingly. Section 8-43-203(2)(d), C.R.S. Of course, Respondents retain the right to dispute whether the need for any additional treatment was proximately caused by the admitted industrial injury, whether medical treatment should be terminated because the injury has been "cured" and whether particular treatment was rendered by an "authorized" provider, and whether "particular treatment" is unnecessary and/or unreasonable. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Claim Appeals Office,* 723 P.2d 749 (Colo. App. 1986).

Respondents do not assert that Claimant's need for treatment is unrelated to the admitted injury, or that the injury had been cured or that Dr. Kawasaki is not authorized to provide treatment. Instead, they assert that Dr. Kawasaki will never be able to provide any reasonable and necessary treatment. Respondents predicate this argument on the factual assertion that any future treatment provided by Dr. Kawasaki will necessarily be "redundant" to that provided by Dr. Reichhardt.

However, it is possible that Dr. Kawasaki will never recommend or provide any additional treatment. Consequently Respondents are not raising a real and immediate controversy. Rather, Respondents are speculating about a future course of events and posit a potential injury that may never occur. In this sense the issue raised by Respondents is not "ripe."

Moreover, the ALJ concludes that the issue raised by Respondents is not currently "fit for adjudication" in the sense that there is a legal barriers to its determination. Section 8-43-101(1)(a) requires Respondents to provide medical care and equipment that "may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve" the effects of the injury. As determined above, the mere fact that Dr. Reichhardt and Dr. Kawasaki share the same medical specialty does not compel the factual conclusion that they are unreasonably or unnecessarily providing "redundant" treatments. Instead, a finding of redundancy, and hence a finding that the service is unreasonable and unnecessary, depends on ascertaining what services Dr. Kawasaki is providing and comparing them to the services provided by Dr. Reichhardt. Because the ALJ cannot predict the course of treatment that may be recommended by Dr. Kawasaki and Dr. Reichhardt in the future, it is not legally possible to perform the requisite factual inquiry and determine whether Dr. Kawasaki's hypothetical treatment will be reasonable and necessary.

Because the ALJ has found the Respondents' request for an order regarding future treatment is not ripe, the issue is beyond his jurisdiction to decide. For this reason the request must be denied. Section 8-43-207(1). In light of this determination the ALJ need not address the other arguments raised by the parties.

ORDER

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

1. Insurer is liable to pay for the medical treatment rendered by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015.

2. Respondents' request for an order finding that future medical treatment by Dr. Kawasaki will be unreasonable and unnecessary is denied.

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

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

DATED: October 30, 2015

DIGITAL SIGNATURE:

David P. Cain

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-957-378-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 30, 2015 and September 28, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 4/30/15, Courtroom 1, beginning at 8:30 AM, and ending at 11:31 AM; and, 9/28/15, Courtroom 2, beginning at 1:30 PM, and ending at 3:45 PM). The Spanish/English Interpreter at the April 3oth session of the hearing was Nina Izquierdo. The Spanish/English Interpreter at the September 28th

Claimant's Exhibits 3 through 5 were admitted into evidence, without objection. The Respondents' objected to Claimant's Exhibits 1, 2, and 6 (Claimant's Salvadorean birth certificate, a driver's license from Veracruz, Mexico, and the adjuster's notes, respectively). The ALJ reserved ruling on these exhibits and subsequently admitted them into evidence at the conclusion of the hearing. Claimant's Exhibit 6 (the adjuster's notes) was withdrawn. Respondents' Exhibits A through H were admitted into evidence, without objection. The evidentiary deposition of Thai Van Nguyen was admitted in lieu of live testimony.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The primary issue to be determined by this decision concerns whether the Claimant sustained a compensable injury to his right knee and back in August 2014, arising out of the course and scope of his employment with the Employer herein.. If so, additional issues involve medical benefits, average weekly wage (AWW), and temporary total disability (TTD) benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

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

Stipulations and Findings

1. The parties stipulated, if compensable, to an AWW of $603.02, and the ALJ so finds.

2. If compensable, the parties stipulated at the April 30, 2015 session of the hearing that the period for TTD benefits runs from August 1, 2014 until the present with a corresponding TTD rate of $402.01 per week, and the ALJ so finds.

3. At the hearing on September 28, 2015 session of the hearing, the parties did not object to the ALJ's indication that while the Claimant misrepresented his identity to the Employer, the misrepresentation was not material to his employment, nor was the Claimant hired under false representation.

Preliminary Findings

4. The Claimant is now an 18-year-old male, born on November 13, 1996, with the given the name of "Salvador Ernesto Olivorio Menjivar." He emigrated from El Salvador to the United States when he was 14-years old.

5. In order to obtain employment, the Claimant gave the Employer the name and birth date of his cousin, "Cristian Amilcar Mejivar" (DOB 02/26/1995), because the Claimant was not yet old enough to work.

6. The Employer hired the Claimant on April 15, 2011, as a prep-cook and dishwasher. The Claimant worked for Employer fairly regularly until August 1, 2014; although there was testimony that there were a few periods where Claimant quit and was rehired (*See* Deposition of Thai Van Nguyen, pp. 19, ¶¶ 14–25).

7. As part of the Claimant's daily duties, he used and cleaned the meat slicers at the restaurant.

The Alleged Incident

8. On August 1, 2014, a meat slicer at the Employer's restaurant broke. The restaurant owner, Thai Van Nguyen, was not present that day, but Jenny Nguyen, manager of the front-of-the-house (dining area as opposed to kitchen area), was present.

9. The Claimant and the Employer witnesses significantly disagree about what occurred after the meat slicer broke.

The Claimant Version of Events

10. There were two meat slicers, one was heavy (about 160 pounds) and the other was smaller (about 50 pounds); the heavier meat slicer is the one that broke, according to the Claimant.

11. According to the Claimant, Ryan Nguyen (known to the Claimant as "Brian"), brother of Thai Nguyen, asked the Claimant and Viet QuocTran (known to the Claimant as "Vick"), waiter for the Employer, to take the meat slicer out of the restaurant and put it into a van for repair. According to the Claimant, while Tran and the Claimant were taking the meat slicer out to the van, Tran was called back into the restaurant and Tran left the Claimant holding the meat slicer on his own.

12. Ryan Nguyen and Tran deny that this occurred and have no recollection of these alleged events.

13. According to the Claimant, he was unable to carry the load by himself and upon reaching a doorway, slipped and fell on water or oil. He stated that he hit his right shoulder on the door frame as he fell. He further stated that he then fell to the floor and landed on his buttocks and back. According to the Claimant, the meat slicer fell onto his right knee and he stated that he was in severe pain and got up very slowly. According to the University Hospital emergency room (ER) records of August 1, 2014, Kristen E. Nordenholz, M.D., state an impression of: "back pain, knee **contusion** (emphasis supplied). There is no evidence for dislocation, fracture, joint effusion, sprain…." The ALJ infers and finds that if a metal meat slicer weighing over 100 pounds fell on the Claimant's right k nee as he stated, injury to the right knee would be more severe than "contusions." For this reason, the ALJ finds that the Claimant's version of events, compared with the contemporaneous medical record, does not measure up to reason and common sense. Consequently, the ALJ finds that Claimant's version of the alleged injury as lacking in credibility.

14. According to the Claimant, Ryan Nguyen heard the noise of the machine falling, but ignored the Claimant. No one else witnessed the event. According to the Claimant, he then told Ryan Nguyen that he needed a doctor because he had an accident. According to the Claimant, Ryan Nguyen responded that the Claimant should go home and never comeback because. Jenny Nguyen didn't like Claimant. Ryan Nguyen categorically denies each of the Claimant's contentions in this regard.

15. The Claimant then went to University of Colorado Hospital for treatment with his friend, Walter Rodriguez, who spoke English and could translate for the Claimant.

16. According to the Claimant, Rodriguez returned to the restaurant on the afternoon of August 3, 2014, to pick up Claimant's paycheck, but did not get it.

17. According to the Claimant, around 10:00 P.M., on August 3, 2014, he and Rodriguez met Thai Nguyen at the restaurant to get the Claimant's final pay check. Rodriguez translated for the Claimant in this exchange to get the money and describe the injury.

18. For the reasons herein below given, the ALJ finds the Claimant's version of events lacking in credibility.

19. The Claimant returned to University of Colorado Hospital on August 11, 2014, and the ER recommended that the Claimant see an orthopedist, though Claimant never saw an orthopedist.

20. Claimant was then advised by his attorney to see David Yamamoto, M.D., regarding his injuries.

Employer, Employees, and Family Members of the Employer's Version of Events,

21. The restaurant has two meat slicers; both are equally large in size. Tran testified that the slicers were "very large items." Jenny Nguyen testified that the slicers were "the same size," "very heavy," and that they were "never moved" because of their weight. Son Nguyen ("Teo"), the handy-man for the Employer, testified that the slicers were each about "200 pounds." Considering "Teo's" expertise concerning these meat slicers, the ALJ finds his testimony concerning the weight of the slicers more credible than the Claimant's or anyone else's testimony concerning the weight of the meat slicers. Therefore, the ALJ finds that each meat slicer weighed approximately 200 lbs.

22. Both of the meat slicers were broken on August 1, 2014. According to Jenny Nguyen, both machines were broken and the machines were essential to the running the restaurant, so that is why she called Son Nguyen to fix them. Son Nguyen verified that both machines were malfunctioning. He stated that one of the meat slicers was put back together improperly and the other needed a new electrical switch.

23. Upon finding out that the meat slicers were broken around 3:00 – 4:00 P.M., Jenny Nguyen called Son Nguyen to come over and repair the slicers. Son Nguyen's testimony verified that Jenny Nguyen called him to come fix both of the meat slicers.

24. Jenny Nguyen then went next door where Ryan Nguyen was working to remodel a building. Jenny Nguyen asked Ryan Nguyen to come and look at the meat slicers. Ryan Nguyen testified that he was next door remodeling when Jenny Nguyen came by and asked him to take a look at the meat slicers around 3:00 – 4:00 P.M.

25. Ryan Nguyen and Son Nguyen both arrived at the restaurant. While Son Nguyen was trying to fix the slicers, Jenny Nguyen became frustrated with the Claimant because the Claimant had not told her when the first meat slicer broke, which she thought was irresponsible. According to Jenny Nguyen, the Claimant became enraged at her and tried to hit her two or three times. Ryan Nguyen and Son Nguyen were able to stop the Claimant from trying to hit Jenny Nguyen. Son Nguyen, Ryan Nguyen, and Jenny Nguyen all testified consistently to this altercation and the stopping the altercation. The Claimant denies that any of this ever happened. Either. Ryan, Son and Jenny Nguyen are engaging in a concerted conspiracy to make the Claimant look bad, or the Claimant is not being truthful. The ALJ infers and finds that the Claimant is not being truthful in this regard.

26. After the altercation stopped, according to the Nguyens, the Claimant left the restaurant. The ALJ infers and finds that neither meat slicer was ever lifted and that the Claimant sustained no injuries at work during the times in question.

27. Son Nguyen verified that the slicers were never lifted. He testified he put one of the meat slicers back together properly and then it was fixed. Son Nguyen also stated that he was able to fix the second meat slicer by going to the store and buying a new electrical switch. He came back and installed the switch without ever moving the slicer. Regarding the Claimant's alleged injury, Son Nguyen stated that the Claimant "never carried the machine, how can he be injured?"

28. Tran testified that he never carried the slicer with the Claimant. The ALJ finds Tran's testimony credible.

29. According to Jenny Nguyen, the Claimant never reported an injury or lifted the machine. Jenny Nguyen testified that after Claimant stormed out following the altercation, she did not see him again.

30. Ryan Nguyen verified that the machine was never lifted. He testified that he never asked the Claimant to move the machine, never heard the machine falling, and did not see the Claimant sustain any injury whatsoever on August 1, 2014. The ALJ finds Ryan Nguyen's testimony persuasive and credible, thus, making it highly unlikely that the machine fell on the Claimant as the Claimant alleges.

31. On August 3, 2014, at around 4:30 P.M., Rodriguez came to the restaurant to ask for the Claimant's last paycheck. Thai Nguyen and Dorris Nguyen, Thai Nguyen's sister-in-law, were eating Pho when Rodriguez arrived. Rodriguez explained to Thai Nguyen and Dorris Nguyen that the Claimant felt embarrassed about the altercation he had with Jenny Nguyen, but the Claimant had a difficult time working with her. Thai Nguyen told. Rodriguez that he (Thai) preferred to speak with the Claimant in-person. Dorris Nguyen and Thai Nguyen testified consistently about this conversation with Rodriguez. The ALJ finds this version of events more credible than the Claimant's version of events.

32. On August 3, 2014, at 10:30 P.M. when the restaurant closed, the Claimant and Rodriguez returned to the restaurant. Thai Nguyen paid the Claimant. Claimant and Rodriguez explained that the Claimant was injured, but would not say where the injury was or show Thai Nguyen any medical bills or paperwork. The Claimant and Rodriguez only requested that Thai Nguyen pay for the injuries. Thai Nguyen paid the Claimant money for his work and did not see him again. The ALJ finds the above approach of the Claimant and Rodriguez to Thai Nguyen, without presenting medical bills but asking that Thai pay for the injury to severely compromise the Claimant's overall credibility.

Claimant's Medical Records (Exhibits 4 and 5)

33. Claimant's Exhibits 4 and 5 indicate that the Claimant suffers from a strain in the lumbar region, strain in the thoracic region, contusion of knee, and sprain of shoulder. The Claimant insisted that the injuries were a result of dropping the meat slicer. The Claimant's alleged cause of these injuries is **not** credible because it contradicts natural laws of physics, body mechanics, and the probability that the alleged incident would cause only minor injuries if the subject of the incident did not happen to be made of iron.

34. Regardless of exactly how large the meat slicer was, somewhere between 160 and 200 pounds according to the testimony, the ALJ finds that such a large metal object falling would likely have caused substantially more than a contusion of the Claimant's knee. Therefore, the ALJ finds the Claimant's testimony concerning the incident lacking in credibility.

The Claimant's Credibility

35. While the Claimant's misrepresentation of his identity was concededly not material to his employment, the ALJ finds the misrepresentations calls into question his credibility. For example, in Exhibit 1 (Claimant's Birth Certificate) his date of birth is November 13, 19**96**. However, in Exhibit 4-1 through 4-18 (Claimant's Workers' Compensation Medical Records from Dr. Yamamoto), Claimant's date of birth is listed as 02/ Exhibit 5-10 through 5-18 (Claimant's Emergency Room Records from University Hospital), his date of birth is listed as February 26, 1992. In Exhibit C-7, ¶ 19 (Interrogatories), the Claimant listed his date of birth as February 21, 1992. Furthermore, the Claimant filed this workers' compensation claim under his cousin's (Christian Amilcar "2/26/1995. In *Exhibit 4-19* through *4-21* (also Claimant's Workers' Compensation Medical Records from Dr. Yamamoto), the Claimant's date of birth is listed as February 21, 19**92**. In Mejivar" (*sic)*, name. These discrepancies illustrate the Claimant's tendency to be less than honest and, thus, compromise his credibility.

Ultimate Findings

36. *While Exhibits 4 and 5* indicate that the Claimant suffered some minor injuries, the ALJ finds his testimony that the injuries occurred while working for Employer is unsubstantiated, contradicted by several Employer witnesses, in defiance of natural laws of bio-mechanics and, therefore, substantially lacking in credibility. Consequently, the ALJ finds that the Claimant's allegations that sustained a work-related injury while working for the Employer herein are not **credible. On** the other hand, the Employer witnesses testified consistently with one another about the events of August 1, 2014. All six of the Employer's witnesses were sequestered, instructed not to discuss their testimony among each other and yet all testified consistently and credibly.

37. The ALJ makes a rational choice to accept the testimony of the six Employer witnesses and the reject the Claimant's testimony.

38. The Claimant has not proven by a preponderance of the evidence that any injuries sustained occurred during the course of his employment with Employer.

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 the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). . As found, while Exhibits 4 and 5 indicate that the Claimant suffered some minor injuries, the Claimant's testimony that the injuries occurred while working for the Employer is unsubstantiated, contradicted by several Employer witnesses, in defiance of natural laws of bio-mechanics and, therefore, substantially lacking in credibility. Consequently, as found, the Claimant's allegations that he sustained a work-related injury while working for the Employer herein are not **credible. On** the other hand, the Employer witnesses testified consistently with one another about the events of August 1, 2014. All six of the Employer's witnesses were sequestered, instructed not to discuss their testimony among each other and yet all testified consistently and credibly.

Substantial Evidence

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

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to establish that the cause of his contusions was work-related, thus, he failed to prove compensable injuries.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592

P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

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

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

_____
Court Clerk

Wc.ord

ISSUES

The issues presented for determination are as follows:

- Whether Claimant suffered a new, compensable injury on June 17, 2013 (WC 4-958-107);

- In the alternative, whether the Division Independent Medical Examination (DIME) physician erred in his opinion that Claimant has reached maximum medical improvement (MMI) for her July 31, 2012 industrial injury (WC 4-932-919);

- Whether Claimant is entitled to temporary total (TTD) disability benefits from August 4, 2014 and ongoing;

- Whether Claimant is entitled to temporary partial disability (TPD) benefits for periods of time in 2012 and 2013.

- Whether the MRI arthrogram recommended by Dr. Hugh Macaulay is reasonable, necessary and related to Claimant's industrial injury.

- The Claimant listed average weekly wage (AWW) on her case information sheet, but neither party endorsed average weekly as an issue. The ALJ identified AWW as an issue for hearing and neither party objected. Based on the record, including evidence offered by the Claimant regarding AWW, the ALJ concludes the issue was tried by the consent of the parties.

FINDINGS OF FACT

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

1. The Claimant suffered a compensable injury to her right SC joint on July 31, 2012 while working for the Employer in Housekeeping. At the time of the injury, Claimant's primary duties involved cleaning hotel rooms.

2. Subsequent to her July 31, 2012 injury, Claimant received treatment from various physicians within Concentra Medical Center including Drs. Villavicencio and Dixon.

3. The medical records from Concentra lack specific details of Claimant's initial pain complaints. The diagnoses provided by the Concentra physicians included: upper

arm/shoulder strain, shoulder pain, sternum strain and sternoclavicular ("SC") joint strain. Claimant's medical treatment primarily included work restrictions, physical therapy and pain medication.

4. The physical therapy records reflect that treatment was directed at pain at the right SC joint, and along the clavicle. The treatment included stretches and exercises for multiple muscles around the shoulder joint.

5. On September 24, 2012, Claimant returned to regular duty with Employer.

6. By October 30, 2012, Claimant had responded to the conservative treatment measures and reported two pain free days to Dr. Samuel Chan. At that visit, Dr. Chan did not note any visible abnormalities, nor did he document any loss of range of motion.

7. At a physical therapy appointment on November 6, 2012, Claimant reported no pain in the right upper extremity. The physical therapist, Catherine Kent documented the same range of motion in the right shoulder as in the left. Claimant reported that she continued to take medication on a daily basis every morning.

8. On November 6, 2012, Dr. Dixon placed Claimant at maximum medical improvement (MMI) without impairment, restrictions or recommendations for maintenance care.

9. Claimant became a supervisor sometime around November 2012 which did not require her to do as much work with her arms.

10. Claimant testified that while she experienced some pain in her right upper extremity, she never sought medical treatment.

11. The Employer lost the contract with the hotel to which Claimant was assigned. The contract ended effective June 17, 2013. In the week or so leading up to June 17, 2013, Claimant moved supplies and equipment out of the hotel.

12. While moving supplies, Claimant experienced increased pain in her right shoulder and upper chest. Claimant testified that she reported the injury to Maria Juliet, a receptionist for Employer. Ms. Juliet referred Claimant back to Concentra for treatment.

13. Records from Concentra Medical Centers indicate that Claimant returned for treatment on June 25, 2013, which is consistent with Claimant's testimony concerning Ms. Juliet's referral back to Concentra.

14. Dr. Villavicencio evaluated the Claimant at Concentra on June 25, 2013. Dr. Villavicencio recommended restrictions of no lifting over 10 pounds. He also prescribed medications, but the records do not reflect what type or dosage.

15. It is apparent from the medical records that Dr. Villavicencio and Concentra treated Claimant's recurrent symptoms as part of her July 31, 2012 claim.

16. On July 16, 2013, Claimant saw Dr. Chan. Dr. Chan noted that prior to the appointment on July 2, 2013, Claimant had complained of severe pain in her right shoulder and at the SC joint. He noted that he performed a subacromial space injection which had been rather beneficial. The Claimant reported no pain.

17. Claimant saw Dr. Villavicencio on July 23, 2013 for follow up. Claimant reported increased symptoms in the SC joint due to increased workplace activities. Dr. Villavicencio noted a mild visible deformity at the SC joint.

18. Dr. Villavicencio imposed work restrictions that included no use of the right arm. Dr. Villvicencio referred the Claimant for an evaluation by an orthopedic specialist. He diagnosed shoulder pain and SC joint sprain; recurring pain at SC, improved in AC.

19. On August 16, 2013, Claimant saw Dr. Rajesh Bazaz, for the orthopedic evaluation. Dr. Bazaz noted "a little bit of swelling over the SC joint but no gross deformity." He documented pain on palpation at the SC joint and very minimal positive impingement findings. Dr. Bazaz felt that there were no good surgical options for the SC joint, but that an injection at the SC joint could be done under fluoroscopic or CT guidance. He noted that Claimant would consider this treatment and follow up if she chose to undergo the injection.

20. Following her visit with Dr. Bazaz, Claimant continued with physical therapy.

21. On September 24, 2013, Claimant returned to see Dr. Villavicencio. She had declined to undergo the injection Dr. Bazaz had recommended, and because there were no further treatment options, Dr. Villavicencio placed Claimant at MMI. For maintenance care he recommended finishing physical therapy, six months of Naproxen, and follow up visits with Dr. Chan for six months. Dr. Villavicencio did not recommend permanent restrictions. With regard to permanent impairment, Dr. Villavicencio assigned Claimant a 6% upper extremity rating for lost range of motion.

22. Respondents filed a Final Admission of Liability consistent with Dr. Villavicencio's opinion and Claimant timely requested a DIME. Ultimately, Dr. Brian Beatty was selected as the DIME physician.

23. On October 15, 2013, Claimant returned to see Dr. Chan. Dr. Chan noted that since September 24, 2013, the Claimant has had progressive pain over the entire right shoulder girdle area without radiation, numbness or tingling. On examination, Dr. Chan noted tenderness to palpation over the right AC joint and subacromial space, and a positive impingement sign. Dr. Chan performed an injection into the subacromial space.

24. Claimant returned to see Dr. Villavicencio on November 7, 2013. She complained of a three to four week history of pain in the right paraspinous cervical and trapezius along with persisting SC pain. Dr. Villavicencio recommended reopening the claim and made a referral to Dr. Burris due to Claimant's delayed recovery. Dr. Villavicencio also indicated that if the case was reopened the Claimant's work hours should be modified to six hours per day, and that she should return to physical therapy.

25. Dr. Beatty performed the DIME on March 5, 2014. Claimant reported to him that her symptoms had worsened. She reported pain radiating from her shoulder down into her elbow and to her chest and upper back. During his physical examination of the Claimant, Dr. Beatty noted tenderness to palpation over the SC joint and shoulder girdle including the rhomboids, pectoralis, infraspinatus, trapezius, supraspinatus and teres minor.

26. In his report, Dr. Beatty noted that on November 6, 2012, Claimant was "pain free and functioning normal." He concluded that Claimant's current symptomatology was unrelated to her July 31, 2012 claim because Claimant's pain did not return for almost one year and that her constellation of symptoms suggested other problems such as tendinitis and impingement of her shoulder inconsistent with a SC strain.

27. Dr. Beatty noted a 14% upper extremity rating which he did not attribute to the admitted work injury.

28. Claimant testified that around the end of July 2014, she could no longer continue working for Employer due to the pain in her right shoulder. She resigned her position with the Employer. She has not returned to work since leaving work for Employer.

29. Claimant retained Dr. Hugh Macaulay to conduct an IME which occurred on September 30, 2014. Claimant reported to Dr. Macaulay that she had neck pain, right arm pain, shoulder pain, depression and inability to sleep.

30. Dr. Macaulay noted that Claimant's range of motion had worsened since Dr. Beatty's evaluation. Dr. Macaulay determined that Claimant's current impairment rating would be 16% of the upper extremity.

31. Dr. Macaulay concluded that Claimant suffered from chronic instability of the SC joint with anterior subluxation of the clavicle. He recommended an MRI arthrogram of the shoulder to help define any underlying derangement.

32. During the hearing, Dr. Macaulay testified that he disagreed with Dr. Beatty's opinion that Claimant's newer right shoulder symptoms would be unrelated to an injury to the SC joint. Dr. Macaulay explained the role and physiology of the SC joint. He explained that the SC joint and the clavicle serve as the buttress to the shoulder and that instability at the SC joint would lead to instability of the shoulder. He directly attributed Claimant's loss of function in the shoulder to lost function in the SC joint. He

concluded that Claimant required an MRI arthrogram of the right shoulder in order to determine the extent and nature of the right shoulder problem.

33. Dr. Macaulay also explained that once an individual sustains a subluxation of the SC joint, they are more prone to future subluxations.

34. Dr. Macaulay opined that Dr. Beatty erred in his conclusion that Claimant was at MMI. Dr. Macaulay also testified that Dr. Beatty erred in concluding that Claimant's right shoulder symptoms were not caused by the subluxation of her SC joint.

35. The ALJ credits the opinions of Drs. Macaulay and Villavicencio as more persuasive than those of Dr. Beatty. Dr. Macaulay provided a detailed explanation concerning how Claimant's newer symptoms relate back to the original injury. In addition Dr. Villavicencio believed that Claimant's presentation in June 2013 related back to the original injury and he even recommended reopening the claim in November 2013. Dr. Beatty opined that Claimant's symptoms in June 2013 could not be related to the original injury because "almost 1 year" had elapsed between the time Claimant reported resolution of her symptoms and the resurfacing of similar symptoms. He also believes that because Claimant suffers from some newer symptoms in addition to SC joint pain, that none of the symptoms are related to the original injury. The ALJ is not persuaded that Claimant's lack of symptoms for seven months (rather than one year) somehow severs the causal connection between the original injury and the resurfacing of similar symptoms. Claimant's job duties had changed causing her to use her arms less which plausibly explains why her symptoms had subsided for seven months then returned when her activities increased.

36. Dr. Beatty's opinion also ignored that the Claimant specifically complained to him about recurrent SC joint pain, a symptom consistently related to the original injury throughout the records.

37. Clear and convincing evidence demonstrates that Claimant's ongoing symptoms are related to her initial industrial injury, and that Dr. Beatty's determination to the contrary was wrong. Dr. Villavicencio's November 2013 recommendation to reopen WC 4-932-919 supports the finding that Claimant's recurrent symptoms relate back to the initial injury.

38. Dr. Macaulay opined, and the ALJ agrees, that Claimant is not at MMI. She needs additional treatment to cure and relieve her of the effects of July 2012 industrial injury.

39. The Claimant has failed to prove, by a preponderance of the evidence, that she sustained a new, compensable injury to her right upper extremity on June 17, 2013 (W.C. No. 4-958-107). As found above, the Claimant's recurrent symptoms relate back to the initial injury.

40. The Respondents admitted for an AWW of $375.66. The Respondents, however, assert that the wage records admitted into evidence reflect an AWW of $318.73. The Respondents calculated that over an 86-week period of time from March 15, 2012 through November 8, 2013, the Claimant earned $27,464.74 making her AWW $318.73. The ALJ is not persuaded to reduce the AWW based on wages Claimant earned months after her injury. Further, the ALJ is not persuaded that the AWW should be adjusted at this time. Thus, the admitted wage of $375.66 remains in effect.

41. The Claimant has failed to prove entitlement to any temporary partial disability for the period of time from July 31, 2012 and November 6, 2012; or for the period of time from June 17, 2013 through August 3, 2014. The Claimant presented no persuasive evidence that she experienced a partial wage loss as a result of her industrial injury.

42. Claimant's job duties for the Employer included cleaning hotel rooms, making beds, vacuuming, and cleaning bathrooms. Claimant resigned her position with the Employer because she could not clean anymore. Prior to Claimant's resignation on November 7, 2013, Dr. Villavicencio had recommended Claimant work modified duty with no more than six hours of work per day.

43. On September 30, 2014, Dr. Macaulay recommended that Claimant work sedentary duty due to her right shoulder. According to Dr. Macaulay's report, Claimant last worked on August 4, 2014.

44. The Claimant has proven, by a preponderance of the evidence, that she was temporarily and totally disabled as of August 5, 2014 and continuing. The period from August 5, 2014 through the hearing date, both dates inclusive, equals 41 weeks and 3 days. Claimant's admitted TTD rate is $250.44. As of the date of the hearing, past due TTD benefits totaled $10,375.37.

CONCLUSIONS OF LAW

General

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

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

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

Compensability of W.C. 4-958-107 Injury (June 17, 2013)

A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1)(c), C.R.S.; *Parra v. Ideal Concrete*, W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 7, 1998].

As found, the Claimant failed to prove that she sustained a compensable injury to her right upper extremity on June 17, 2013 (W.C. No. 4-958-107).

Overcoming the DIME for W.C. 4-932-919

Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. 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 highly probable and free from serious or substantial doubt, and 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). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. 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

(ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

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 Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

As found, Claimant has established by clear and convincing evidence, that it is "highly probable" that Dr. Beatty erred in concluding that Claimant is at MMI because her ongoing right shoulder complaints were unrelated to her industrial injury. Claimant is not at MMI and requires additional treatment to cure and relieve the effects of her industrial injury.

Medical Benefits

To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P.2d 583 (Colo. App. 1994). Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Morey Mercantile v. Flynt,* 47 P.2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

Claimant has established that she is entitled to reasonable and necessary medical treatment related to her right shoulder injury. Specifically, the MRI arthrogram recommended by Dr. Macaulay is reasonable, necessary and related to Claimant's industrial injury. However, any additional treatment must be performed by authorized medical providers within the chain of referral.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

The Respondents urge the ALJ to reduce Claimant's admitted AWW based on wages Claimant earned both before and well after her industrial injury. As found above,

the ALJ is not persuaded to reduce the Claimant's AWW based on the evidence presented. Thus, the admitted wage of $375.66 remains in effect.

Temporary Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury or disease 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. Section 8-42-103, C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). There is no statutory requirement that a claimant must present medical opinion evidence from an attending physician to establish her physical disability. *Lymburn v. Symbois Logic,* 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary disability. *Id.*

Claimant made little or no effort to present evidence regarding temporary partial disability benefits. To the extent the Claimant expects the ALJ to review the wage records admitted into evidence and determine that she suffered a partial wage loss, such request is unreasonable. Claimant offered no testimony concerning any partial wage loss in 2012 or 2013. As such, her request for TPD is denied.

Claimant has established by a preponderance of the evidence that she is entitled to TTD beginning on August 5, 2014 until terminated by law. Claimant has demonstrated that her work injury has contributed to her wage loss. According to Dr. Villavicencio's report dated November 7, 2013, Claimant required reduced work hours due to her work injury. In addition, Dr. Macaulay opined that Claimant should work sedentary duty. Claimant's testimony that she could no longer perform her job duties due to her shoulder pain was credible and persuasive. As such, Claimant became temporarily and totally disabled on August 5, 2014, the day after she resigned her position. Claimant continues to be temporarily and totally disabled, especially since she has had no meaningful medical treatment for over a year.

ORDER

It is therefore ordered that:

A. The Claimant failed to prove that she sustained a compensable injury to her right upper extremity on June 17, 2013 (WC No. 9-958-107).

B. Claimant has proven by clear and convincing evidence that the DIME physician erred when placing her at MMI for the July 31, 2012 injury (WC

4-932-919) and finding that none of her recurrent symptoms were related to that injury.

C. Respondents shall pay the costs of medical treatment, designed to cure and relieve the effects of the July 31, 2012 injury.

D. Claimant's AWW remains $375.66, with a corresponding TTD rate of $250.44. Respondents' request to modify the AWW is denied.

E. Claimant's request for TPD is denied.

F. Respondents shall pay the Claimant temporary total disability benefits from August 5, 2014 and ongoing at the admitted TTD rate of $250.44. As of the date of the hearing, past due TTD benefits totaled $10,375.37.

G. Respondents shall continue to pay the Claimant temporary total disability benefits of $250.44 per week from May 21, 2015 and continuing until terminated pursuant to law.

H. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

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

DATED: October 9, 2015

DIGITAL SIGNATURE:

L. Broniak

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-958-164-01

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 October 7, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/7/15, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on October 19, 2015. On October 19, 2015, the Respondents filed objections, which essentially argue for the Respondents' additional spin on the facts, requesting supplementation of the Findings. Some objections are meritorious and incorporated into the final version of the decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The paramount issue to be determined by this decision concerns the Respondents request to overcome the Division Independent Medical Examination (DIME) of Jonathan Bloch, D.O., whose opinion is that the Claimant is not at maximum medical improvement (MMI). If the DIME is not overcome, medical benefits (to improve the Claimant's condition) and average weekly wage (AWW) are at issue. The parties agreed that the issues of temporary disability benefits and the recommended reverse total shoulder arthroplasty should be reserved.

At the commencement of the hearing, the Respondents raised the threshold issue that DIME Dr. Bloch had a conflict because he had treated the Claimant a couple of times before performing the DIME. Division of Workers Compensation Rules of Procedure (WCRP), Rule 11 (H), 7 CCR 1101-3, provides disqualification of a DIME if the appearance of or an actual conflict of interest exists, as defined by subsection (1) – (3). Having treated the Claimant a couple of times in the past and the treatment relationship having been severed after a sufficient passage of time, the ALJ determines that neither an appearance of nor an actual conflict exists in this case, however, since Dr. Bloch may have to perform a follow up DIME, the ALJ determined that another authorized treating physician (ATP), who is not with Concentra (Dr. Bloch's organization) should be selected by the Respondents. On October 8, 2014, the Respondents designated John Raschbacher, M.D. (who is not with Concentra) as the Claimant's new ATP.

The Respondents bear the burden of proof, by clear and convincing evidence to overcome the DIME.

FINDINGS OF FACT

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

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that the Claimant's AWW is $524.17.

2. The Claimant is a 63 year old worker who sustained a compensable injury to his left shoulder on June 9, 2014, when he picked up a roughly 35 lbs. round piece of scrap metal about 2 feet in diameter and dense, grabbing from the waist level to throw it into a bin around shoulder level. He felt his left shoulder pop with immediate focal sharp anterolateral stabbing/burning pain and slight hot nerve pain radiating to the bicep region.

3. Upon timely reporting of the incident, the Employer sent the Claimant to Concentra Medical Center. At Concentra, the Claimant treated with Glenn Petersen, PA (Physician's Assistant); Jonathan Bloch, D.O; Steven A. Abrams, M.D; Robert Dixon, M.D; Mark S. Failinger, M.D; Keith A. Meier NP (Nurse Practitioner); John D. Papillion, M.D; Syketha Sprague RN (Registered Nurse); Darla Draper,. M.D; Diane K. Adams, D.O; Terrell Webb, M.D; Valerie Maes PA-C; and, Bryan Counts, M.D.

4. The Claimant treated conservatively for his left shoulder. On two occasions Dr. Bloch treated the Claimant, June 14, 2014 and August 14, 2014. Dr. Bloch addressed Dr. Papillion's opinion on August 14, 2014.

5. On November 6, 2014 Dr. Papillion stated, "[Claimant] has a massive rotator cuff tear with rotator cuff arthopathy in his left shoulder. I would recommend reverse total shoulder arthroplasty. We will get the surgery authorized and contact his daughter for dates. I will see him postop. No use of the Left arm."

6. The proposed surgery never occurred. Instead, on December 1, 2014, Valerie Maes, PA-C wrote: "Patient is returning for a recheck of injuries stated below left shoulder pain from rotator cuff tear and severe osteoarthritis (as evidenced by MRI which I reviewed) ***patient presents today for re-evaluation despite being told by Dr. Counts over the telephone on 11/17/2014 that his shoulder injury has been determined to be non work related and that his case has been closed*** (emphasis supplied)***.*** He states (through an interpreter) that he does not know what to do now. I advised him that he needs to follow-up with Dr. Papillion through his private insurance for further evaluation and care" (Exhibit 2, page 8).

7. On December 4, 2014, Dr. Counts placed the Claimant at MMI without impairment, which in the opinion of James Lindberg, M.D., the Respondents' Independent Medical Examiner (IME), was done because it was communicated to Dr. Counts that the Claimant's shoulder injury was "non work related and that his (Claimant's) case has been closed." "Maximum Medical Improvement" is defined as a "point in time when any medically determinable physical…impairment has become stable and no further treatment is reasonably expected to improve the condition. § 8-40-201 (11.5), C.R.S. Apparently, Dr. Counts abdicated his independent medical judgment in favor of the insurance carrier's determination that he Claimant's injury was **not work related** (emphasis supplied). Consequently, Dr. Counts' opinion concerning MMI is entitled to **no** weight whatsoever.

8. The Respondents filed a Final Admission of Liability (FAL), based on Dr. Counts' opinion, on December 10, 2014, admitting for medical benefits only and fixing an MMI date of December 1, 2014.

9. The Claimant timely objected to the Final Admission and, through counsel, applied for a DIME. Through the strike process Jonathon Bloch, D.O., was selected.

10. Dr. Bloch conducted the DIME on April 17, 2015. In reviewing the DIME report, the ALJ infers and finds that it is more probable than not that Dr. Bloch did not recognize Claimant, or realize that the Claimant had previously treated with him. The Respondents argue that this is speculative and, therefore, Dr. Bloch's opinion should be discredited. Au contraire, Dr. Bloch is a Level 2 accredited physician with the Division of Workers' Compensation and would not have been allowed to perform a DIME if he were not Level 2 accredited. The ALJ, therefore, accords a presumption of integrity and propriety to Dr. Bloch, which the Respondents have failed to overcome.

11. Dr. Bloch concluded that the Claimant was not at MMI. Although the Claimant had sustained a previous shoulder injury in 2006 with the same employer, "it got better without ongoing pain or problems whatsoever and MMI occurred only a week after the 2006 injury. The 2006 injury resolved quickly and completely without any interim pain, limitations or need for medical care until this new injury" (Respondents' Exhibit B, page 6).

12. Dr. Bloch explained, "[Claimant] has worked full heavy duty without pain, limitations or need for medical care on an ongoing basis for roughly 12 years, until his shoulder injury on 06/06/14. [Claimant] now has severe left shoulder damage for which reverse total shoulder arthroscopy surgery is his most advanced option. [Claimant's] current condition is not associated to anything pre-existing, nor would his current prognosis exist had he not sustained this industrial shoulder injury. His current problems stem from massive rotator cuff tearing that occurred when he was throwing metal overhead as part of his work duties on 04/09/14 [sic]."

Respondents' Independent Medical Examinations (IMEs)

13. Wallace K. Larson, M.D., performed a medical record review of the Claimant's treatment records on September 1, 2014. Dr. Larson was of the opinion that the Claimant sustained a mild shoulder strain for which he is at MMI without impairment. To the extent that Dr. Larson's opinion contradicts the opinions of Dr. Bloch they are far less persuasive than dr. Bloch's opinions.

14. James Lindberg, M.D., performed an IME of the Claimant on August 11, 2015. Dr. Lindberg stated the following opinion: "It appears that his rotator cuff tear was a chronic situation that had a mild exacerbation. He has improved significantly in his range of motion since his IME (DIME) by Dr. Bloch and I see no upside doing a reverse shoulder arthroplasty. I would agree with Dr. Failinger that his rotator cuff tear is probably not repairable. I think for all intents and purposes that he is at MMI as of this date." To the extent that Dr. Lindberg's opinion contradicts the opinions of Dr. Bloch they do not rise to the level of making it highly probable, unmistakable and free from

serious and substantial doubt that Dr. Bloch's opinion that the Claimant is not at MMI is in error.

15. Dr. Lindberg testified at hearing. Although Dr. Lindberg testified that the reverse total shoulder surgery was not recommended, Dr. Lindberg testified that placing Claimant at MMI on December 4, 2014 was improper. He testified that further medications to control pain, inflammation and muscle spasms would be appropriate. Dr. Lindberg further testified that additional physical therapy would have been appropriate in December 2014. It was Dr. Lindberg's opinion, however, that further treatment would be related to the Claimant's underlying condition and not the admitted injury herein. For the reasons stated herein above, the ALJ rejects this causal opinion concerning the need for further treatment.

16. Dr. Bloch, in his DIME report, recommended medications, physical therapy, massage therapy, acupuncture, steroidal shoulder injections, and evaluation with an orthopedic surgeon for consideration of a reverse total shoulder surgery (Respondents' Exhibit B, page 7). Consequently, it would be premature to consider the issue of reverse total arthroplasty until another independent orthopedic surgeon (other than Dr. Papillion) evaluates the Claimant

17. Other than having treated the Claimant two times previously, the Respondents pointed to no other persuasive evidence that a direct and substantial conflict of interest was present at the time of the DIME with Dr. Bloch. The Claimant treated with numerous providers at Concentra. In their objections, the Respondents speculate that Dr. Bloch may have a financial incentive not to place the Claimant at MMI so he could further treat the Claimant. This assertion implies a violation of the Hippocratic Oath and it is unfounded. This rank speculation has no place in our system of jurisprudence. Nonetheless, the point is moot because the Respondents have designated Dr. Raschbacher, who is not with Concentra, to prospectively be the Claimant's authorized treating physician (ATP), which the ALJ ordered during the hearing.

18. Because Dr. Bloch continues to be the selected DIME in this claim, Concentra is no longer authorized to treat the Claimant.

Ultimate Findings

19. The ALJ finds Dr. Counts and Dr. Larson's opinions as significantly lacking in credibility for the reasons herein above described. While IME Dr. Lindberg was credible, the ALJ finds DIME Dr. Bloch's opinions on causality and the fact that the Claimant is not at MMI from the admitted injury of June 9, 2014 more credible and controlling herein.

20. Between conflicting opinions on causality and MMI, the ALJ makes a rational choice to accept the opinions of DIME Dr. Bloch and to reject all other opinions to the contrary.

21. The Respondents have failed to demonstrate that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Bloch's opinion that Claimant is not at MMI from the admitted injury is in error.

CONCLUSIONS OF LAW

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

Credibility

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

Bloch's opinions on causality and the fact that the Claimant is not at MMI from the admitted injury of June 9, 2014 more credible and controlling herein.

Substantial Evidence

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

Overcoming the Division Independent Medical Examination (DIME)

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office, supra*; *Eller v. Indus. Claim Appeals Office, supra* at 400. "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME

physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Respondents failed to demonstrate that it was highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Bloch's opinion that Claimant is not at MMI from the admitted injury was in error.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents, having failed to overcome the Division Independent Medical Examination opinion of Jonathan Bloch, D.O., the Claimant is not at maximum medical improvement.

B. Any and all issues not determined herein, including the appropriateness of the reverse total shoulder arthroplasty, are reserved for future decision.

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

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

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

_____
Court Clerk

Wc.ord

ISSUES

The issues determined in this decision involve compensability and Claimant's entitlement to medical benefits for an alleged left knee injury. The specific questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained an acute left knee meniscal tear, in the course and scope of his employment on April 18, 2014; and if so,

II. Whether Claimant established, by a preponderance of the evidence, that the arthroscopic surgery, specifically the left meniscal tear debridement procedure, performed by Dr. Romero was reasonably necessary and causally related to the April 18, 2014 injury.

STIPULATIONS

The parties reached the following stipulations prior to the commencement of hearing:

I. Should the claim be found compensable, the parties stipulated that Claimant's average weekly wage is $922.16.

II. Claimant withdrew, with Respondent's concurrence, the endorsed issues of temporary total disability and temporary partial disability without prejudice.

III. Claimant withdrew, with prejudice and Respondents concurrence, the endorsed issue of "Right of Selection".

IV. Respondent reserved the Workers' Compensation medical fee schedule for any medical benefit awarded or ordered.

The parties' oral stipulations are approved by the ALJ.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Nathan Walter and Alex Romero, M.D., the ALJ enters the following findings of fact:

1. Claimant is a long term employee of Respondent-Employer. He has worked in the capacity of a correctional officer for the past 15 years. His position requires that he

make security rounds every 30 minutes during an 8.5 hour shift. To complete a round, Claimant must ascend and descend four flights of stairs containing 20 steps each.

2. Claimant was assigned to the graveyard shift during April 2014. On April 17, 2014, after completing his fifth set of rounds at approximately 11:45 p.m., Claimant testified that his left leg felt "tight".

3. As Claimant began his sixth set of rounds at approximately 12:15 a.m. on April 18, 2014, he developed left knee pain. Claimant testified that as he put his left foot down on the fourth step of the first flight of stairs and readied himself to ascend this stair; he heard a pop and felt a burning sensation in his left knee. He testified he had immediate pain and his knee began to swell.

4. Claimant denied having pain or prior left knee injuries before this alleged incident. Claimant testified that he was simply walking forward up the stairs when the injury occurred. He was not twisting and denied stumbling or falling.

5. Claimant testified he finished his rounds with difficulty, and upon returning to his work station called his supervisor, Captain Nathan Walter to report the incident. He told Capt. Walter that his knee hurt, and that he could not continue to work. Claimant reported swelling of the knee and that he showed Capt. Walter that swelling. Claimant then left work.

6. Capt. Walter testified by deposition on July 28, 2015. Capt. Walter testified that Claimant reported an injury to him sometime between 11:00 p.m. and midnight. He stated Claimant, "[C]alled me up and said that his knee was hurting him; that he had been going up and down the stairs as part of his duties that he was assigned to that night." (Walter depo. pgs. 5-6: 19-2). "He said, basically, in his words, if I remember right, Boss, I've been trying to do it, but my knee's killing me. I don't know if I can keep going up the stairs anymore tonight." (Walter depo. pg. 17: 18-21). "[H]e just said, I tried going up the stairs, and it just started killing me." (Walter depo. pg. 18: 6-7). Claimant said it started hurting him when he was going up the stairs (Walter depo. pg. 18: 14). Capt. Walter testified that he did not <u>remember</u> Claimant "saying anything about a pop in his knee" at the time he spoke with Claimant. (Walter depo. pg. 18: 21-23)(emphasis added). Capt. Walter testified that he went to see Claimant following this incident during which time Claimant showed him his left knee. According to Capt. Walter's testimony, Claimant's left knee appeared swollen. (Walter depo. pg. 7: 18-23).

7. After meeting with Claimant, Capt. Walter directed him to fill out a first report of injury with Lieutenant Sheryl Salazar. (Walter depo. pg. 6: 5-21). According to Capt. Walter, Lt. Salazar is diligent about completing the necessary required paperwork associated with work place injuries so that the matter is reported to Human Resources (HR). Per the testimony of Capt. Walter, Lt. Salazar does not report work injuries directly to Human Resources (HR). Rather, she simply takes the report from the injured worker and completes the first report of injury paperwork for delivery to the staff "resource coordinator" who in turn, forwards it to HR. Capt. Walter testified that Lt.

Salazar would not delay the completion of the necessary paperwork associated with an injury claim. To the contrary, per Captain Walter's testimony, Lt. Salazar took the claim "that night", because he called and spoke to her about it. (Walter depo. pg. 14: 8-22).

8. Claimant testified that he completed the paperwork with Lt. Salazar on Tuesday, April 22, 2014. Claimant testified that he was unable to go to a doctor for about a month following the injury because he was waiting for a call from HR to send him to an appointment with a work comp doctor. (Id., p. 24). Claimant testified that he had to fill out a second incident report because the first one was lost.

9. Based upon the evidence presented, including Captain Walter's testimony that Claimant completed the first report of injury paperwork with Lt. Salazar (Walter depo. pg. 6: 15-21) combined with his testimony that Lt. Salazar took Claimant's report of injury, the ALJ credits Claimant's testimony to find that the original report of injury, more probably than not, was completed on April 22 and subsequently misplaced either by the resource coordinator or HR. The ALJ finds further that this resulted in Claimant's need to complete a second incident report on May 22, 2014 and a delay in his referral to an authorized provider. Consequently, the ALJ rejects Respondents suggestion that Claimant's testimony regarding the date he completed a first report of injury with Lt. Salazar is incredible. Based upon the evidence presented, the ALJ finds that Respondent-Employer had notice of the claim before May 22, 2014.

10. On June 10, 2014, Claimant was evaluated by Dr. Douglas Scott at Centura Centers for Occupational Medicine (CCOM)(Claimant's Exhibit 9, pg. 44). The treatment note from this encounter indicates that Claimant provided a history of constant, burning, stabbing pain in both knees, made worse by stairs. There is no report of Claimant hearing a "pop" as he was ascending the stairs documented in the report. Dr. Scott noted that a prior MRI of the right knee demonstrated "patellofemoral chondromalacia". He opined that Claimant's symptoms were likely emanating from patellofemoral syndrome caused by "pre-existing chondromalacia patella aggravated with walking up and down stairs". The ALJ infers from his report that Dr. Scott felt that Claimant's left knee symptoms were caused by pre-existing patellofemoral chondromalacia because he had symptoms of the same in the right knee, which condition was confirmed by the prior MRI. Dr. Scott referred Claimant to physical therapy (PT).

11. Conservative care, including the abovementioned PT failed to result in lasting improvement. By July 10, 2014, Claimant had completed his initial round of PT without "significant objective improvement." (Claimant's Exhibit 9, pg. 53 & Exhibit 10, pg. 72). He reported worsening bilateral knee pain during a follow-up appointment at CCOM with Dr. Paul Merchant on July 17, 2014. Although the report generated from this appointment indicates that Claimant had bilateral knee pain, the report indicates that Claimant only had difficulty in transferring on and off the exam table secondary to left knee pain. Directed examination of the left knee revealed mild diffuse swelling, pain laterally to palpation, pain at the extremes of range of motion, crepitus under the left patella and 1+ pitting edema over the left shin. Dr. Merchant ordered an MRI of the left knee to rule out (r/o) left knee patellofemoral syndrome (PFS).

12. Claimant underwent an MRI of his left knee at Pueblo Imaging Center on July 28, 2014 (Claimant's Exhibit 7). The MRI revealed: "1. Acute radial tear posterior horn medial meniscus; 2. Acute grade I-II injury medial collateral ligament; 3. Probable mild chronic proximal patellar tendinosis; 4. Joint effusion". Regarding the patellofemoral compartment the MRI report notes: "Evaluation of the patelleofemoral compartment shows fluid accumulation but no other significant abnormality".

13. Claimant was referred to Dr. Robert William Nolan for orthopedic consult regarding his left knee following his MRI. Dr. Nolan evaluated Claimant on August 1, 2014 documenting the following:

> . . . [W]ork-related injury when he was walking up and down [stairs] experienced acute pain in both knees swelling left and right knees the right knee a lot better then left knee pain is continued since April. He said no injections. MR study confirmed complex tear posterior horn medial meniscus and chondromalacia changes, intact ligaments, no bone bruise.

Dr. Nolan opined that the tear of the posterior horn of the medial meniscus was both "complex" and "degenerative" in nature. He gave Claimant a left knee intra-articular cortisone injection. He recommended post-injection therapy and a follow-up appointment in 3-4 weeks for consideration of additional treatment options, including possible arthroscopic intervention should Claimant's pain persist. (Resp. Ex. D., pg. 32). Dr. Nolan's report does not state that Claimant heard or felt a pop in his left knee while ascending a stair at work, and there is nothing stating or alluding to a traumatic injury in this report.

14. Claimant returned to CCOM on August 4, 2014 during which time he was re-evaluated by Dr. Merchant who noted Claimant's MRI findings. Regarding the mechanism of injury Dr. Merchant documented the following: "[Claimant] reported significant swelling of both knees in April associated with stair climbing at work. There was no single precipitating event described by the employee". Based on his testimony, the ALJ finds that Claimant disputes that there was no work related cause precipitating his left knee symptoms. Rather, he testified that he told Capt. Walter, his CCOM providers, Dr. Nolan and his physical therapist that his knee popped as he was ascending the stairs which pop was followed by burning pain. As noted above, Capt. Walter could not recall whether Claimant mentioned that his knee popped. Moreover, while the initial medical record for Dr. Scott does not document a "pop", it reflects a report by Claimant of burning pain and an objective finding of joint swelling, as testified to by Claimant and in the case of swelling, observed by Capt. Walter. Based upon the evidence presented, including the objective findings on MRI coupled with Dr. Romero's testimony, the ALJ credits the testimony of Claimant to find that, more probably than not he heard a pop in his left knee as he was ascending the stairs in the early morning hours of April 18, 2014. Consequently, the ALJ rejects Respondents contention that

Claimant changed his story of the injury's occurrence to include hearing a "pop" to better support his claim.

15. On August 25, 2014, Claimant returned to Dr. Nolan for a post-injection follow up. (Claimant's Exhibit 5, pg. 23-25). Claimant indicated that the injection did not help and he was still having a lot of pain. (Id.).

16. On September 24, 2014, Dr. Nolan examined Claimant. Dr. Nolan noted that Claimant had:

> Continued left knee posterior medial joint line pain due [to] work related posterior horn medial meniscal tear, anterior patellofemoral pain possible plica and/or chondromalacia patella both conditions work-related nature and failed to improve with nonsurgical treatment.
> (Claimant's Exhibit 5, pg. 27).

Claimant expressed a desire to proceed with surgery and Dr. Nolan sought authorization from Respondent-Employer noting as follows: "In my opinion medical necessity for left knee surgery is a direct consequence of his work-related injury in April this year[.]" (Claimant's Exhibit 5, pg. 27).

17. On November 24, 2014, Claimant underwent an x-ray of his left knee. The x-ray revealed mild tricompartmental degenerative changes. (Claimant's Exhibit 4).

18. On December 9, 2014, Claimant was examined by Dr. Alex Romero, M.D. (Claimant's Exhibit 5, p. 33). Dr. Romero noted that:

> Today I am seeing this patient for first evaluation of a left knee injury that occurred on [2/18/2014]. He works for DOC. He was walking he stepped wrong and felt a pop. He's been seeing Dr. Nolan for this for the last several months. He has failed intra-articular cortisone and physical therapy. Is not taking anything for the pain. He an MRI which suggested a meniscus tear.
> (Claimant's Exhibit 5, pg. 34).

19. After reviewing Claimant's x-rays and MRI films, Dr. Romero recommended that Claimant undergo an arthroscopic debridement of his meniscus tear. (Claimant's Exhibit 5, p. 33 & 36). The request for authorization to proceed was denied and Respondent requested that Anjmun Sharma, M.D., a level II accredited, board certified family practice physician who has been practicing occupational medicine primarily since 2005, perform an independent medical examination (IME) to assess the cause of Claimant's left knee's meniscus tear and its relatedness to the alleged injury asserted in this claim.

20. Dr. Sharma, completed the requested IME on April 30, 2015. He opined in writing and later through his hearing testimony that Claimant's left meniscus tear and his

need for a left partial medial meniscectomy were unrelated to his alleged injury event of walking up a stair at work on April 18, 2014. He testified and wrote that while Claimant gave a very clear history of an injury occurring while ascending stairs when he saw Dr. Sharma, "[T]here is no actual mechanism of injury that would account for the level and degeneration of tear in the left knee." (Resp. Ex. A, pg. 7). Claimant did not state that he planted or twisted his knee or his leg, "[W]hich is characteristic and typical as a mechanism of injury for most meniscal injuries." (Id.) Dr. Sharma found the medical records did not contain any documentation that an actual injury occurred on April 18, 2014 (Id.). Dr. Sharma concluded, "I do not believe that the patient sustained a work injury that was alleged to have occurred on April 18, 2014." (Resp. Ex. A, pg. 9) He felt Claimant's left knee condition was due to a long-standing degenerative disease process of arthritis and chondromalacia as seen on the left knee MRI, and diagnosed by Dr. Nolan (Resp. Ex. A, pg. 10). Dr. Sharma testified that Claimant's arthritis and chrondromalacia were pre-existing condition and was not caused or aggravated by his work activity of walking up stairs on April 18, 2014 (Resp. Ex. A, pg. 10). He found it important and informative that Claimant had the same diagnoses and symptoms in his right knee, which he opined supported a conclusion that the condition of the left knee was due to age and a degenerative process (Id.). According to Dr. Sharma, this degenerative process caused Claimant's meniscal tear and his need for medical benefits, including surgery. Dr. Sharma testified simply walking up stairs could not and did not cause Claimant's left knee's meniscus tear because that activity places no force or strain on the meniscus. It is akin to walking, which is an everyday, ubiquitous activity. He further opined that Claimant was predisposed for developing his left knee condition due to [refereeing] sports, coaching sports, running and other recreational activities that the Claimant regularly participated in.

21. On May 7, 2015, Dr. Romero performed a left knee arthroscopy with partial medial meniscectomy. (Claimant's Exhibit 12). The surgical report reflects that inspection of the trochlea was remarkable for a "small 5 × 5 mm area of grade 4 chrondromalacia at the very superomedial aspect" of the left knee in addition to global grade 2 chrondromalacia in the medial compartment of the left knee. The left medial meniscus was remarkable for a "large radial tear at the junction of the posterior body and medial body" which was "debrided back to a stabilized base".

22. Dr. Romero testified by post hearing deposition held August 17, 2015. The ALJ accepts Dr. Romero as a board certified, fellowship trained expert in the field of orthopedic medicine and orthopedic surgery. Dr. Romero is not level II accredited.

23. Dr. Romero testified that Claimant was initially treated by his partner, Dr. Nolan, who treated him conservatively with cortisone injection and physical therapy. (Romero depo. pg. 8). He testified that his focus, when he saw Claimant was on treatment, and not on the cause of the meniscal tear. Regarding the relatedness of the meniscal tear, Dr. Romero also testified, that Claimant's described mechanism of injury "makes it less likely that there would be a high degree of suspicion for a meniscal tear" as simply walking upstairs is not the "most common" way to tear a meniscus. Dr. Romero agreed that the most common way a meniscus is torn is by planting and twisting (Romero depo.

pg. 12: 24-25; pg. 20: 21-25). Nonetheless, Dr. Romero testified meniscus tears are caused by other means. (Romero depo. pg. 12). Furthermore, Dr. Romero testified that in his experience a meniscus tear can be caused by Claimant's description of stepping down on the foot and hearing a pop and that the popping sound that Claimant described was consistent with a meniscus tear. (Romero depo. pg. 12 & 13).

24. Dr. Sharma admitted that that hearing a pop in a knee when planting a foot followed by immediate swelling and pain, as well as heat, could be a sign of some type of internal derangement, but he couldn't say with certainty whether it would be a meniscus tear. Dr. Sharma agreed that a meniscus tear is a type of internal derangement.

25. Dr. Romero testified that while he could not tell if the tear was acute by the time he performed surgery, the MRI revealed an acute meniscus tear and it was unusual to see a tear described as such on MRI. (Romero depo. pg. 8: 17-25 & pg. 9: 1-2). He opined that Claimant's "imaging and his examination were consistent with the described injury, and that after failing conservative measures with physical therapy and cortisone injections, that the next reasonable step to treat his injury would be an arthroscopy. (Romero depo. pg. 9).

26. Dr. Romero testified that when he performed the arthroscopic surgery on Claimant he found some chondromalacia in the medial compartment of Claimant's knee. (Romero depo. pg. 15-16). However, Dr. Romero further testified that these findings did not affect the meniscus. (Id., pg. 16). Moreover, the surgical report indicates that Claimant had sustained a radial tear of the meniscus, not as complex tear as described by Dr. Nolan. As Dr. Romero performed the surgery and visualized the actual tear, the ALJ finds his description of the tear more persuasive than Dr. Nolan's. Based upon the surgical report, the ALJ finds the limited area of severe degenerative change unlikely to be causative of Claimant's meniscal tear. More probably than not, Claimant's meniscal tear was independent of, and unrelated to the degenerative changes noted on the articular surfaces of Claimant's left knee.

27. Dr. Romero testified that based on the mechanism of injury described and his review of the medical records, that it is medically probable that Claimant suffered a meniscus tear while walking up the stairs. (Romero depo. pg. 12). The ALJ infers from this opinion that Dr. Romero believes that Claimant suffered an acute meniscal tear while ascending the stairs to complete his work duties and that the tear is directly related to the conditions of Claimant's employment for Respondent. Based upon a totality of the evidence presented, including the MRI report and Dr. Romero's surgical report, the ALJ finds record support for this opinion.

28. Dr. Romero testified that in his opinion, based on a reasonable degree of medical probability, the arthroscopic knee surgery that he performed was related to the meniscal injury that Claimant sustained on April 18, 2014 and that the surgery was reasonable and necessary based upon his repose to conservative care. (Romero depo. pg. 13-14).

29. Based upon the evidence presented, the ALJ finds the opinions of Dr. Romero credible and more persuasive than the contrary opinions of Dr. Sharma. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that his employment duties were the proximate cause of his left knee injury and that his need for left knee arthroscopy was related to that compensable industrial 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" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. *C.R.S. § 8-40-102(1).*

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

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. *C.R.S. § 8-43-210.* In this case, the ALJ resolves the inconsistencies in the record in favor of Claimant and credits his testimony regarding the events surrounding the incident, the reporting of the incident to Capt. Walter and Lt. Salazar, and the manifestations/symptoms he felt during and after the incident. Furthermore, the ALJ concludes Dr. Sharma's testimony to be contradicted by the weight of the objective findings on the MRI and the more persuasive opinions of Dr. Romero.

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-

related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's injuries arise out of his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). 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.*

G. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum*

Company, W.C. No. 3-850-024 (December 14, 1989). In this case, Claimant has established the requisite causal connection between his work duties and his left knee injury. In concluding that Claimant has proven that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. Similar to Mr. Gomez, Ms. Bastian did not "slip, fall, or trip." Also akin to Mr. Gomez, Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." Following a hearing, the claim was found compensable. On appeal the respondents argued that the ALJ erred in part on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis. The same is true of the instant case.

H. While Mr. Gomez was found to have degenerative changes in his left knee, he is not asserting that his injuries arose out of the aggravation or acceleration of a pre-existing condition. Rather, Claimant asserts that he suffered a discrete injury to his left meniscus when he placed his foot down on a step and began to ascend the stair. Indeed, Respondents admit in their position statement that the special hazard doctrine articulated in *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo.App. 1992), has no applicability in this case. Consequently, this order does not address whether the stairs at Claimant's workplace constitute a special hazard of employment.

I. Concerning compensability, Respondent argues principally that the described mechanism of injury, specifically the everyday act of ascending stairs, does not place stress, strain, or force on the meniscus sufficient to cause an acute tear. Accordingly, Respondent asserts that Claimant's meniscal tear is either degenerative in nature, as suggested by Dr. Sharma, or idiopathic. In any case, Respondent contends that the tear is not work related, because it does not arise out of claimant's employment. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). The undersigned ALJ is not persuaded. As noted above, the ALJ rejects Dr. Sharma's opinions as unconvincing. Furthermore, the ALJ is not persuaded that Claimant's meniscal tear is "idiopathic", i.e. of unknown cause. Rather, as found, Dr. Romero credibly and persuasively testified that Claimant's imaging and physical examination were consistent with the described injury and that Claimant's act of placing his foot down and preparing to ascend a step to complete his security rounds likely caused an acute meniscal tear in the left knee. Consequently, the ALJ is persuaded that the act of ascending the stairs is causative of Claimant's left knee injury.

J. In reaching this conclusion, the ALJ finds Claimant's activities analogous to

the activity causing injury in *Bastian,* expressly the act of ascending a stair. Merely because Claimant was engaged in activity which is performed many times a day outside of work, does not compel a finding that his subsequent injuries are not work-related. To the contrary, Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the evidence presented persuades the ALJ that Claimant's employment caused his meniscal tear because it obligated him to ascend multiple flights of stairs every 30 minutes to complete his security rounds. In keeping with the decision announced in *City of Brighton*, the ALJ concludes that Claimant's meniscal tear would not have occurred "but for" these conditions and obligations of employment. Accordingly, the ALJ finds that the evidence presented supports a conclusion that Claimant's injury arose out of his employment because it would not have occurred but for his employment. *City of Brighton, supra.* Claimant has established the requisite causal connection between his injuries and his work duties. Thus, his injuries are compensable.

Medical Benefits

K. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). As found, Claimant has established that his need for arthroscopy was directly related to his compensable left knee injury. Nonetheless, the question of whether the arthroscopy was reasonable and necessary must be addressed.

L. The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that the left knee medial meniscus debridement was reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Nolan and Dr. Romero to recommend arthroscopy. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that Claimant's left knee arthroscopic procedure was reasonable and necessary to cure and relieve him of the going effects of his injury.

ORDER

It is therefore ordered that:

1. Claimant has established by preponderance of the evidence that he suffered a compensable claim to his left knee on April 18, 2014.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his left knee condition, including, but not limited to the left knee arthroscopic procedure performed by Dr. Romero May 7, 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: October 27, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-960-460-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 8, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/8/15, Courtroom 1, beginning at 1:30 PM, and ending at 2:30 PM).

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. Respondents' Exhibits A and B were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on October 13, 2015. On October 19, 2015, the Respondents indicated no objections to the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns compensability.

FINDINGS OF FACT

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

1. The Claimant 9d.o.b. 5/18/50) worked as an office manager for the Employer on the date of injury, February 14, 2014, when his back and right upper extremity (RUE) injuries occurred.

2. During the afternoon of February 14, 2014, the Claimant observed a snow storm picking up outside his office. He walked out to the Employer-provided parking lot at approximately 4:15 PM to clean his windshield of snow. At the time, he was still within normal working hours.

3. The Claimant's only present co-worker that day was a doctor of audiology. The Claimant offered to clean her windshield of snow as well. When he finished clearing the snow from both vehicles, he noticed that his windshield had accumulated ice. He then opened the driver side door, and reached for his ice scraper that lay on the passenger seat. At that point, he slipped and fell, causing injury to his right shoulder and low back.

4. The Claimant then finished scrapping the ice, and returned back into his office to finish the workday.

5. According to the Claimant, he would not have been able to safely operate his vehicle if the snow and ice had not been cleared. The parking lot was used by employees of the Employer and was a benefit of the job. This fact was not disputed by the Respondents. Nor did the Respondents dispute that the Claimant was injured during work hours in the parking lot attached to the Employer's building.

Medical

6. The Claimant was seen by Donna Brogmus, M.D., at the Banner Occupational Health Clinic, on February 6, 2014. Dr. Brogmus diagnosed pain in the lumbar spine, a bilateral shoulder strain and pain in the right hip. The Claimant gave Dr. Brogmus a history of his slip-and-fall injury in the Employer's parking lot two days earlier.

7. On September 15, 2014, the Claimant was evaluated by Nicholas K. Olsen, D.O. The Claimant gave Dr. Olsen a consistent history of the parking lot slip and fall incident. Dr. Olsen diagnosed a right L4 and L5 radiculopathy and a disc protrusion at L4/5.

Ultimate Findings

8. The Claimant's testimony is credible and undisputed.

9. The Claimant's actions of scraping snow off his windshield was during working hours in an Employer-provided parking lot served the interests of the Employer because the Claimant's efforts provided an incidental mutual benefit to the Employer and the Claimant by ensuring the health and safety of the Claimant and his co-employee in order that they may safely drive home from work.

10. The Claimant has proven, by a preponderance of the evidence that he sustained compensable injuries to his low back, shoulders and right hip, arising out of the course and scope of his employment for the Employer herein.

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 the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Personal Comfort/Dual Purpose Doctrine

b. Because the health and welfare of an employee is of incidental mutual benefit to an employer, the "personal comfort" doctrine applies herein. *See Ocean Accident & Guaranty Corp. v. Pallaro,* 66 Colo. 190, 180 P. 95 (1919). Thus, the "personal comfort" doctrine, among other things, applies to getting wood for heating a cabin and cooking food [*Ocean Accident & Guaranty Corp. v. Pallaro, supra*] and taking a shower after work [*Divelbiss v. Indus. Comm'n,* 140 Colo. 452, 344 P.2d 1084 (1959)], by extension, as found, it applies to scraping snow off car windshields, during working hours, in an Employer-provided parking lot.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Thereupon, it is incumbent that it be shown that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained compensable injuries on February 4, 2014, arising out of the course and scope of his employment for the Employer herein..

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the

existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable injury on February 4, 2014, arising out of the course and scope of his employment for the Employer.

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

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

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 October 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-961-697-02 AND 4-960-653

ISSUES

1. Whether the Claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and occurring within the course of her employment with Respondent-Employer.

2. Whether the Claimant has proven by a preponderance of the evidence that she is entitled to medical treatment.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits from September 16, 2014 ongoing.

STIPULATIONS

1. Claimant's Average Weekly Wage is $376.99

2. WC No. 4-960-653 is consolidated into WC No. 4-961-697.

FINDINGS OF FACT

1. The Claimant testified that she began working for Respondent-Employer in its meat packing plant on March 12, 2014 and worked there until her last day of work on September 16, 2014. She testified that she has not received formal notice of termination from this job. The Claimant worked in the Meat Wrapper position, where she was responsible for wrapping, weighing, pricing and labeling meat and related products for retail sale in Respondent's retail grocery stores (see job description at Claimant's Exhibit 6; Respondent's Exhibit B). .

2. Meat Wrappers may work in one of two rooms, the beef room (a/k/a retail room) or the pork room. Employer has only one job description for the Meat Wrapper position, regardless of whether the position is performed in the beef room or the pork room. Both the beef room and the pork room have cement floors.

3. Meat Wrappers working a shift in the beef room would rotate between three different positions during a shift: "bagging off", "feeding the machine", and "packing off." During testimony at the hearing, the Claimant described the details of each position: "Bagging off" required the employee to grab the cuts of meat off of a conveyor belt and place them in bags. "Feeding the machine" required the employee to stand in one position and grab the cuts of meat off of a conveyor belt and feed them into a machine. "Packing off" required the employee to grab previously-bagged cuts of meat off of a conveyor belt and place them on a crate, and then to move the crate

(which weighed about 10-20 pounds) onto a pallet when the crate was full. The employees in the beef room rotate between the stations multiple times per day.

4. Although Meat Wrappers in the beef room would rotate between three different positions, the Claimant testified that the physical duties of the Meat Wrapper position in the beef room and the pork room essentially were the same. It was just that the employees would rotate to different types of machines in the beef room and in the pork room, the employees rotated machines, but it was all the same "packing off" function.

5. Despite the Claimant's testimony that she worked 3-4 shifts per week in the pork room, Employer's Timekeeper records establish that from Claimant's first shift in the pork room on April 5, 2014, through her last date of work on August 18, 2014 (a total of 25 weeks), the Claimant, on average, worked quite a bit less than that in the pork room. See below:

Week End	Shifts in Pork Room	Hours in Pork Room	Total Hrs. worked for the week (Beef & Pork room)	Exhibit
3/15/2014	0	0	23.3	Ex C, p. 17
3/22/2014	0	0	36.1	Ex C, p. 18
3/29/2014	0	0	32.7	Ex C, p. 19
4/5/2014	1	1.8	36.1	Ex C, p. 20
4/12/2014	1	2.0	36.3	Ex C, p. 21
4/19/2014	1	1.2	31.9	Ex C, p. 22
4/26/2014	3	17.2	32.8	Ex C, p. 23
5/3/2014	4	14.8	43.6	Ex C, p. 24
5/10/2014	0	0	34.8	Ex C, p. 25
5/17/2014	2	16	39.3	Ex C, p. 26
5/24/2014	1	7.5	48.8	Ex C, p. 27
5/31/2014	0	0	38	Ex C, p. 28
6/7/2014	1	9.9	44.1	Ex C, p. 29
6/14/2014	1	7.9	46.88	Ex C, p. 30
6/21/2014	0	0	34	Ex C, p. 31
6/28/2014	1	9.7	45	Ex C, p. 32
7/5/2014	1	9.2	59.5	Ex C, p. 33
7/12/2014	1	8.2	39.5	Ex C, p. 34
7/19/2014	0	0	25.4	Ex C, p. 35
7/26/2014	3	11.3	41.9	Ex C, p. 36
8/2/2014	0	0	33.3	Ex C, p. 37
8/9/2014	0	0	36.3	Ex C, p. 38
8/16/2014	0	0	42	Ex C, p. 39
8/23/2014	2	2.2	8.6	Ex C, p. 40
8/30/2014	0	0	28.9	Ex C, p. 41
9/6/2014	1	1.5	31.1	Ex C, p. 42
9/13/2014	3	4.1	24.6	Ex C, p. 43
9/20/2014	1	1	8.4	Ex C, p. 44
Total	**28**	**125.5**	**983.18**	

6. The Claimant testified that she began to experience pain in her right heel while at work, which she likened to a nail going into her heel. She next felt pain in her left hip and then the back pain came after that. She testified that the pain started a month to two months into the job when she was working in the pork room.

7. The Claimant testified that she told her "leads" of the pain she was experiencing.

8. The Claimant initially treated with Amber Wobbekind, M.D., of the Denver Health Medical Center Westside Family Health Center, her primary care physician. On July 18, 2014, the Claimant was seen by Family Nurse Practitioner Amy M. Quinones of Denver Health Medical Center (DHMC), who documented complaints of right heel pain for "one week" with intermittent radiation of pain up to her calf. FNP Quinones documented that the Claimant reported that she thinks she may have had the same symptoms to her left foot years ago, which resolved. The medical record does not note any complaints of left hip pain or low back pain at that visit (Claimant's Exhibit 10, p. 53; Respondents' Exhibit L, p. 93).

9. On August 14, 2014, the Claimant returned to DHMC, where she was seen by Judy Conrad, NP. Ms. Conrad documented that that Claimant complained of a "ball on her back for over a year with 'no pain'", left hip pain for two months and right foot pain. NP Conrad also documented a history of left plantar fasciitis that had improved. Ms. Conrad referred Claimant for a left hip x-ray and to a podiatrist (Claimant's Exhibit 10, p. 51).

10. On August 19, 2014, Amber Wobbekind, M.D., authored a letter/report addressed "To whom it may concern" stating that she was treating the Claimant for her hip condition and that the Claimant's trochanteric bursitis of her hip was "particularly exacerbated by working the pork room." Dr. Wobbekind also restricted the Claimant from lifting weight over 10 pounds. There were no reasons provided as to why the pork room, in particular, would exacerbate the Claimant's condition. Nor is there any causation analysis connecting any of the Claimant's work duties with her current condition (Claimant's Exhibit 11, p. 57). A second letter/report was authored by Dr. Wobbekind on August 20, 2014 which again imposes a work restriction limiting lifting to 10 pounds and, in addition, imposes a restriction that the Claimant "may not bend from the hip to reach items on or near the floor more than 10 times per day" and also continues to restrict the Claimant from working in the pork room during either of the 2 restricted activities as this seems to "really exacerbate her condition." The restrictions were to remain in place for the next 8 weeks (Claimant's Exhibit 11, p. 56). Then, on August 22, 2014, a third letter/report authored by Dr. Wobbekind listed the Claimant's restrictions due to trochanteric bursitis as not bending from the hip to reach items on or near the floor more than 10 times per day and not working in the pork room. The lifting restriction of 10 pounds no longer appears, nor is there any replacement lifting restriction for items of any weight whatsoever (Claimant's Exhibit 11, p. 55).

11. It is not clearly established that Dr. Wobbekind's actually saw or examined the Claimant prior to authoring the three conflicting letters within the span of

4 days. The only DHMC documentation in the admitted exhibits of any interaction between the Claimant and Dr. Wobbekind on August 19, 2014, is contained in Claimant's Exhibit 10, p. 50, which indicates telephone encounters on August 19, 2014, August 20, 2014 and August 21, 2014. However, the Claimant testified on cross-examination that she did see Dr. Wobbekind on August 19, 2014. She stated that after leaving work at 5:33 AM, only 33 minutes after first arriving, she later went to go see the doctor that day, The Claimant testified that she did not tell Dr. Wobbekind that she thought her pain was from working in the pork room. Rather, the Claimant testified that she merely explained to Dr. Wobbekind what kind of work activities she did and Dr. Wobbekind came to that conclusion. The Claimant further testified that she told Flerida Watson and other people at the Employer that working in the pork room was causing her pain.

12. There is e-mail documentation from Mark Hines, who was a "lead" for Employer who worked with the Claimant during this time frame. In the e-mail dated August 20, 2014, Mr. Hines reported that,

> On Tuesday August 19, 2014 [the Claimant] was asked to work in the pork room by Flerida Watson. Flerida informed me that Irene said she couldn't work in pork because it hurt her back. I talked to [the Claimant] and told her that we could have her feed a wrapping machine. [The Claimant] told me that she would rather go home than work in the pork room, I then told [the Claimant] that if she went home that we needed some form of documentation from a doctor when she came back to work. (Respondent's Exhibit F).

13. Mark Hines testified at the hearing that he was a "lead" for Employer as of March 2014 and in June of 2014 he was promoted to foreman. He testified that he did not have a lot of contact with the Claimant but is familiar with the positions in the beef room and the pork room. He testified that he recalled discussions with the Claimant on August 19, 2014 about working in the pork room. As he recalled, the Claimant told him that she would rather go home than work in the pork room. He told her that he needed her to work in the pork room, but she said it hurt her back. He offered to place her at the "feeding the machine" station which is not physically demanding and she would only have to stand in one spot and put trays onto the machine that are then automatically fed into the wrap machine. Mr. Hines testified that the Claimant told him that she would rather go home. He testified that he then told her that she would need to bring in documentation from her doctor that she was unable to perform certain duties.

14. The Claimant testified that when she brought in work restrictions, she was told that if she requires work restrictions from her own doctor then she cannot work. She was told if she seeks modified duty for work restrictions related to a work injury or condition, the Claimant would have to see a workers' compensation doctor. She testified that because of this, she went to see Dr. Kohake.

15. The Claimant completed a report for Work Related Injury / Illness dated August 25, 2014. The Claimant reported lower back, right foot and left hip strain from "lifting and placing baskets on pallets" in the pork room. She listed the date of injury as August 15, 2014. The Claimant described the injury as follows"

> It all started when they started putting me in the pork room. The bending and turning really messed with my hip and back. Also I progressively got planters fasciitis [sic] in my foot from being on my feet all day. Even after getting good shoes and insoles the pain still not going away. Went to Dr. got injected in my foot and still hurts (Claimant's Exhibit 1, p. 1).

16. The Claimant saw Dr. George Kohake for an initial evaluation on August 25, 2014. The Claimant denied any specific injury and reported an onset of symptoms 3-4 months ago (which differs a bit from the 1-week prior onset that the Claimant had reported to FNP Quinones at DHMC on July 18, 2014). The Claimant reported that she has to stand all day and do bending and lifting, sometimes up to 20-30 pounds. The Claimant reported that the pain started with right foot/heel soreness, then left hip pain and now she has pain in her low back with some intermittent radiation of pain/tingling down her right leg. The Claimant reported that she has to work the pork room a lot, which is very vast pack off work duties involving a lot of twisting and bending quickly. The Claimant reported that she felt it was not as hard on her body to work the "retail area" because they rotate different work duties. On her pain diagram, the Claimant circled her right foot, her left hip and the middle of her back. The Claimant provided a past medical history of left plantar fasciitis 4-5 years ago. Dr. Kohake assessed, "right heel pain, probably plantar fasciitis. Left hip pain, possibly trochanteric bursitis versus hip strain. Low back pain with some left leg symptoms but doubt HNP." As to causation, Dr. Kohake opined that "at this point [causation] is undetermined. I want the old records from Denver Health to review." He noted that they would treat the Claimant but that he was not making a positive causation determination pending further review of medical records and information regarding the history of her injury (Claimant's Exhibit 12; Respondent's Exhibit J).

17. On August 29, 2014, the Claimant returned to DHMC and was treated by Brian Boley, PA-C. The medical notes states that the Claimant has been diagnosed with bursitis and plantar fasciitis. The note contains care and treatment instructions, but nothing to indicate any causation analysis tying these conditions to work activities (Claimant's Exhibit 10, p. 48).

18. The Claimant testified that since her pain started she has been in pain constantly. With no activity, her heel pain is a 7/10, her back pain is an 8/10 and her hip pain is a 6/10. Her pain increases with activity. She testified that she is not working at all now, but her pain levels are about the same.

19. Dr. Timothy O'Brien performed an Independent Medical Examination of the Claimant on December 10, 2014 and prepared a written report dated December 26, 2014. The Claimant attributed her hip, foot and back pain to work in the "pork station" where she would take pork from one area and then stack it into crates. The Claimant

told Dr. O'Brien that she worked in the pork station 3-4 times per week for 8-10 hours per day.[1] The Claimant told Dr. O'Brien that she was afraid of losing her job so she didn't really report the injury, although she was advised to do so. She stated that when she couldn't take the pain anymore, she saw her PCP and an occupational health doctor and was taken off work due to light duty restrictions that were not recommended by an occupational health doctor. The Claimant complained of low back pain, lateral left hip pain and pain in the sole of her right heel. The Claimant rated her pain a 7/10. The Claimant reported a 1-2 hour tolerance for standing and sitting and a 1 hour tolerance for walking (Claimant's Exhibit 13, p. 67). After physical examination and review of medical records, Dr. O'Brien opines that none of the Claimant's diagnoses, plantar fasciitis, greater trochanteric bursitis and low back pain, are the result of the Claimant's work activities. Dr. O'Brien opines, that each is a manifestation of her personal health and deconditioned state. He notes that the Claimant's work at Employer was neither physically demanding nor repetitive enough to be a material causative factor for her conditions (Claimant's Exhibit 13, p. 72). In addition he opines that the fact that the Claimant's occupational activities have been restricted (or nonexistent) since August 2014 and yet she still continues to have pain symptoms as of December 2014 is further substantiation that the work activities are not contributing to her condition (Claimant's Exhibit 13, p. 73).

20. Dr. O'Brien also testified as an expert witness by evidentiary deposition on July 16, 2015. He is board certified in orthopedic surgery and underwent fellowship training in the foot and ankle through the American Academy of Foot and Ankle Fellowships. He has treated numerous patients with plantar fasciitis, trochanteric bursitis and back pain and is Level II accredited (Depo. Tr. Timothy O'Brien, MD, pp. 5-6 and pp. 8-9). Dr. O'Brien testified that Claimant has three separate diagnoses: plantar fasciitis of the right foot, greater trochanteric bursitis of the left hip, and low back pain/lumbosacral spondylosis (Depo. Tr. Timothy O'Brien, MD, pp. 14-15).

21. Dr. O'Brien testified that the plantar fascia is a band of collagen in the sole of the foot that connects on the sole of the foot and underneath the heel, and works to keep the arch bowed to maintain the arch. A patient with plantar fasciitis experiences inflammation of the plantar fascia, which almost always occurs under the heel (Depo. Tr. Timothy O'Brien, MD, pp. 16-17). Dr. O'Brien testified that Claimant's duties as a Meat Wrapper would not have caused or aggravated her plantar fasciitis because "there's an absence of studies that supports that. So, when we do occupational health studies, not one study that's ever been performed has scientifically been able to implicate standing or running or climbing stairs or ladders -- we don't have any valid science that implicates any one activity at work as being causative of plantar fasciitis" (Depo. Tr. Timothy O'Brien, MD, pp. 18-19). Dr. O'Brien testified that plantar fasciitis is a result of genetics, age, physical deconditioning, and may be related to nicotine use or diabetes. He stated it makes no logical sense that Claimant's standing

[1] This statement contrasts with the data taken from the Claimant's employment records as set forth in the chart at paragraph 5 (above) which shows the Claimant working primarily in the beef room, with more limited exposure to the pork room.

or walking on concrete floors would have caused or aggravated her plantar fasciitis for two reasons. Moreover if standing on concrete floors was an issue, there should be no difference between the pork room and beef room as both had concrete floors. Thus, Dr. O'Brien testified that within a reasonable degree of medical probability Claimant's duties at work did not cause or aggravate her plantar fasciitis (Depo. Tr. Timothy O'Brien, MD, pp. 18-23).

22. Dr. O'Brien testified that the greater trochanter is the bony bump at the top of the femur on the outside of the hip. The greater trochanter is covered by a bursa which lays flat over the greater trochanter to create a cushion for the iliotibial band, which is a strap of collagen which runs from the ilium bone at the top of the pelvis across the trochanter and down below the knee joint, attaching at the top of the tibia. When the iliotibial band becomes tight, it creates increased pressure on the bursa at the greater trochanter, which causes inflammation of the bursa. This is known as trochanteric bursitis (Depo. Tr. Timothy O'Brien, MD, pp. 23-25). Dr. O'Brien testified that, other than traumatic causes not applicable to the Claimant's condition, almost all iliotibial tightness is caused by aging – as the body gets older, the tissues of the body lose water and dessicate, which causes them to contract and become tighter. Dr. O'Brien testified that within a reasonable degree of medical probability the Claimant's trochanteric bursitis is caused by aging, physical deconditioning/sedentary lifestyle, and possibly her gender, and not by her work duties. Dr. O'Brien testified that there is a complete absence of medical literature or science linking standing, walking or sitting to trochanteric bursitis (Depo. Tr. Timothy O'Brien, MD, pp. 26-29). Dr. O'Brien also testified that if standing, walking or repetitive duties at work did aggravate the Claimant's trochanteric bursitis, then cessation of those duties necessarily would have alleviated her pain. However, the Claimant has not worked for over a year, and yet remains in just as much pain as she was in when she was performing these duties for the employer so this points to a personal health issue as opposed to a work issue (Depo. Tr. Timothy O'Brien, MD, pp. 31-32). Dr. O' Brien specifically testified that Dr. Wobbekind's opinion that the Claimant's trochanteric bursitis may have been caused or aggravated by repetitive motion is not credible because trochanteric bursitis is just as common in the sedentary population (workers not exposed to repetitive motion) (Depo. Tr. Timothy O'Brien, MD, pp. 35-36).

23. Dr. O'Brien testified that the Claimant's MRI was normal given her age (Depo. Tr. Timothy O'Brien, MD, p. 32). Dr. O'Brien opined that Claimant's low back pain is not related to an isolated injury or due to any occupational injury (Depo. Tr. Timothy O'Brien, MD, p. 39).

CONCLUSIONS OF LAW

Generally

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

entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

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

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

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

To the extent that the Claimant seeks a finding of compensability based on repetitive motion/occupational disease as opposed to an acute injury, the Claimant still has the burden to establish the causal relationship. An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, supra.

C.R.S. § 8-40-201(14) defines “occupational disease” as:

> “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment.”

The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Id. Where the disease for which a claimant is seeking compensation is

produced solely by some extrinsic or independent cause, it is not compensable. *Anderson* at 824. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once such a showing has been made, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The hazardous conditions of employment need not be the sole cause of the disease. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Under either an injury or occupational disease theory, the Claimant has failed to establish a causal link between her foot, hip and back conditions and her work duties for Employer. Dr. O'Brien credibly testified that there is an absence of studies supporting the proposition that plantar fasciitis is caused by standing or walking on concrete floors. Dr. O'Brien further testified that plantar fasciitis is a result of genetics, age, physical deconditioning, an inappropriate height/weight ratio, or obesity, and that it makes no logical sense that the Claimant's standing or walking on concrete floors would have caused or aggravated her plantar fasciitis because if those activities did aggravate or accelerate her plantar fasciitis, then cessation of standing on her feet necessarily would have alleviated her pain. However, the Claimant has not worked for over a year, and yet remains in just as much pain as she was in when she was standing and walking on concrete floors. In addition, as documented in the July 18, 2014, and August 14, 2014, DHMC medical reports, the Claimant already has a documented pre-existing history of plantar fasciitis in her left foot, which started years before Claimant began working for Employer and walking on concrete floors.. The Administrative Law Judge concludes that Claimant failed to prove by a preponderance of the evidence that her employment or working conditions caused, aggravated or accelerated her plantar fasciitis.

Dr. O'Brien also credibly testified that, other than traumatic causes not applicable to Claimant's condition, almost all iliotibial tightness is caused by aging – as the body gets older, the tissues of the body lose water and desiccate, which causes them to contract and become tighter – and that within a reasonable degree of medical probability the Claimant's trochanteric bursitis is caused by aging, and not by her work duties. As support, Dr. O'Brien credibly opined that there is no medical science that has ever been published that in any way indicates or would implicate the work activities that Claimant performed as being causative of greater trochanteric bursitis. Furthermore, Dr. O'Brien credibly testified that if standing, walking or repetitive duties

at work did aggravate the Claimant's trochanteric bursitis, then cessation of those duties necessarily would have alleviated her pain. However, the Claimant has not worked for over a year, and yet remains in just as much pain as she was in when she was performing these duties for the employer. Almost the entirety of Claimant's case rests on her testimony that her pain began while working in the pork room along with Dr. Wobbekind's vague and unsupported letter dated August 19, 2014. The Administrative Law Judge concludes that the Claimant failed to prove by a preponderance of the evidence that her employment or working conditions caused, aggravated or accelerated her trochanteric bursitis.

Finally, Dr. O'Brien credibly testified that the Claimant's MRI was normal given her age and that the Claimant's low back pain is a manifestation of her personal health and physically deconditioned state (i.e. overweight, aerobically unfit, lacking flexibility and core strength). Dr. O'Brien further opined that the Claimant's work at Employer was neither of long enough duration nor physically demanding and repetitive enough to be considered a material causative factor that contributed to the onset and progression of her back pain, and that, if there were a direct causal relationship between the Claimant's work and her musculoskeletal symptomatology, then cessation of her work activities should have resulted in cessation of her symptoms. Yet, it did not, proving that the Claimant's work was not a factor contributing to her current condition. The Administrative Law Judge concludes that Claimant has failed to prove by a preponderance of the evidence that her employment or working conditions caused, aggravated or accelerated her low back pain.

Ultimately, the evidence does not support Claimant's allegations that she sustained a work injury or occupational disease that is causally related to her heel, hip and low back conditions and any related need for medical treatment. As such, the Claimant's consolidated claim for compensation is denied and dismissed.

Remaining Issues

The Claimant failed to prove that her claim is compensable. Therefore, the remaining issues regarding medical benefits and temporary disability benefits are moot.

ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain her burden of proving by a preponderance of the evidence that she suffered a compensable injury resulting from work activities in June of 2014 or August of 2014 for the conditions of plantar fasciitis, trochanteric bursitis and/or low back pain.

2. The Claimant's consolidated claim for benefits under the Workers' Compensation Act of Colorado for the conditions of plantar

fasciitis, trochanteric bursitis and/or low back pain is denied and dismissed.

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

DATED: October 27, 2015

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-962-497-01

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, in Denver, Colorado. The hearing was digitally recorded (reference: 10/21/15, Courtroom 3, beginning at 8:30 AM, and ending at 10:35 AM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on October 28, 2015. On October 29, 2015, counsel for the Claimant filed suggested revisions to the proposed decision, some of which are well taken and some of which are not. After a consideration of the proposed decision and the suggested revisions 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 and temporary total disability (TTD) benefits from August 21, 2014 and ongoing.

FINDINGS OF FACT

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

1. The Claimant's date of birth is October 2, 1954. He was employed as a gas fitter/apprentice with the Employer and was with the company for approximately eight years.

2. On August 21, 2014, the Claimant drove to Denver for work in a company vehicle. He arrived back at the Employer campus at approximately 3:30 PM. He alleges that while reaching back to get a bag out of his car the bag stuck, pulling his right arm out of the socket. According to the Claimant, this resulted in "tremendous pain" to his right shoulder. There were no witnesses to the alleged accident.

3. The Claimant went into the office after the alleged accident occurred and spoke to the lead fitter, Phil Severence. According to the Claimant, Severence did not ask him how he was injured and the Claimant did not tell him about the accident. Severence asked the Claimant if he was going to file a workers' compensation claim and the Claimant indicated that he was not going to file a claim. The Claimant did not feel that it was work-related since it had occurred after 3:30 PM. while he was off the clock.

4. The Claimant went to work on August 22, 2014 and spoke to a supervisor, Pat Kreager. Kreager asked the Claimant how he was injured and the Claimant advised him that he was "not sure." The Claimant testified that he was in shock from the injury and had nerve damage from his neck injury with numbness in his hands and fingers, and this is why he did not tell Kreager how he was injured. He stated that he was not in shock when the accident happened, but went into shock either that evening or the next day. The ALJ finds this version of "shock" improbable and contrary to reason and common sense.

5. The Claimant was seen by his family physician, Phillip Rhoads, M.D., at 1:00 PM on August 22, 2014. The Claimant did not advise Dr. Rhoads how he was

injured as he “wasn’t sure” and was “cloudy” when he saw Dr. Rhoads. Dr. Rhoads’ records indicate that there was unclear etiology of pain with no injury and that the Claimant’s right shoulder had started hurting the night before (Respondents’ Exhibit A, p. 30).

6. Dr. Rhoads referred the Claimant to an orthopedic surgeon, Mark Durbin, M.D., who evaluated the Claimant on August 25, 2014. The Claimant advised Dr. Durbin that he did not remember any specific injury or trauma to his shoulder. He told Dr. Durbin that his shoulder “started hurting while driving” (Respondents’ Exhibit B, pp. 49-51)

7. Approximately two weeks after the alleged accident occurred, the Claimant claims that he then remembered that he had been injured at work and the details of the accident. When he was contacted by his supervisor, Joe Reyes, he reported the accident to him and was then advised that he must be seen by a workers’ compensation physician. The ALJ finds this recovery of delayed memory unlikely in light of the fact that the Claimant had seen two physicians shortly after the alleged incident and made no mention of the “bag lifting” incident.

8. The Claimant was evaluated by Hope Edmonds, M.D. on September 4, 2014. At that time he advised Dr. Edmonds that he had injured his right shoulder when he went to retrieve a bag of equipment from the backseat of his vehicle. The Claimant denied any head or neck symptoms. Dr. Edmonds noted that the Claimant had been seen by Dr. Durbin a few days after the injury but that she did not have those notes available. The Claimant advised Dr. Edmonds that he did not realize he needed to come into a workers’ compensation provider to be seen (Respondents’ Exhibit G, p. 85).

9. In February of 2015, Dr. Edmonds was provided with the records of Dr. Rhoads and Dr. Durbin. At that time, she stated that the omission of the mechanism of injury called into question the work-relatedness of the Claimant’s claim. At that time, the Claimant mentioned to Dr. Edmonds that he “fears he may have had a stroke at some point, making him unable to remember how the shoulder injury occurred” (Respondents’ Exhibit G, p. 73). There is no medical evidence indicating that the Claimant may have had a stroke. The ALJ infers and finds that the Claimant came up with a plausible explanation for not reporting the alleged mechanism of the injury earlier and the ALJ does not find this explanation credible in light of the totality of the evidence.

10. In February of 2015, the Claimant first mentioned neck and left upper extremity problems to Dr. Edmonds. She was of the opinion that the neck injury for which he was seeking care was not work-related. She also voiced concerns about the fact that the reports of Dr. Rhoads and Dr. Durbin did not mention the mechanism of injury of pulling a bag out of a vehicle and she felt that the Claimant should seek care outside of the workers’ compensation system (Respondents’ Exhibit G, p. 67).

The Respondents' Witnesses

11. Testimony was taken from Phillip Severence, who was the lead fitter serviceman on August 21, 2014. Severence is presently retired from the Employer. He has "no dog in the fight" so to speak. On the date in question, Severence saw the Claimant at approximately 5:00 PM. At that time, the Claimant notified him that his shoulder was hurting and that he had been **injured at home while working on one of his vehicles.** On the other hand, the Claimant testified that he had hurt himself but did not tell Severence how he had hurt himself. The ALJ finds Severence testimony in this regard more credible than the Claimant's testimony. Severence's testimony squarely contradicts the Claimant's version of a "compensable" injury.

12. Severence contacted his supervisor, Pat Kreager, to let him know that the Claimant had been injured at home and would be out of work.

13. The Claimant came to Severence's home approximately three weeks prior to the hearing. Severence testified that at that time the Claimant told him that he had been injured at work and insisted that he had previously advised Severence of this and that they had gone to report this to a supervisor. Severence testified that this was not accurate and he asked the Claimant to leave.

14. Pat Kreager, the Manager of the Design Department, received a call on August 22, 2014 from Severence. At that time, Severence advised Kreager that the Claimant had hurt his shoulder and was going to the doctor. Kreager asked if this was work-related and Severence stated that the Claimant had advised him that it was not work-related.

15. Kreager saw the Claimant in the office on August 25, 2014. At that time, he asked the Claimant how he had injured himself and the Claimant told him that he had injured himself at home. The ALJ infers that the Claimant, without any basis, is advancing a "conspiracy theory' whereby Severence and Kreager, in corroborating each other, must have somehow been "out to get" the Claimant. The ALJ rejects this implied conspiracy theory and finds that Kreager's corroboration of Severence increases the credibility of both individuals.

16. Joe Reyes is the supervisor in the Gas Construction department. He was at work on August 21, 2014 and saw the Claimant at approximately 3:45 PM. The Claimant , however, did not report an injury to him. Reyes was aware the next day, on August 22, 2014, that the Claimant was off work due to a shoulder injury because he had been advised of this by Kreager.

17. Reyes was briefing the new manager, Greg Sorter, on September 2, 2014. There were two employees off sick that day including the Claimant. Reyes and Sorter

contacted the Claimant by telephone to discuss his time off from work. At that time, the Claimant told them that he had been injured at work. Reyes advised the Claimant that he had to be seen by a workers' compensation doctor.

18. On August 22, 2014, the Claimant alleged that he was in shock and could not remember how the accident occurred and therefore did not report this as work-related. The Claimant testified, however, that he specifically remembers that he did not advise Severence or Kreager that he had been hurt at home. The ALJ finds this convenient denial is a contradiction to the Claimant's theory of being in "shock." as the reason that he could not remember the alleged work-related incident. The Claimant's selective memory, while he was in 'shock," significantly undermines his overall credibility.

19. The ALJ finds the testimony of Severence to be the most credible. Severence is a critical witness. He is retired from the Employer and has no conceivable motivation to lie about what the Claimant advised him on August 21, 2014. The Claimant offered no evidence of "bad blood" between Severence and the Claimant as a potential motivation for Severence to be untruthful. In addition, Severence's testimony is corroborated by Kreager who was also advised by the Claimant that he had been injured at home.

20. There is nothing in the medical records to substantiate the Claimant's allegation of either a stroke or memory problems that would have prevented him from remembering that he had been injured at work and then remembering the accident two weeks later, yet contemporaneously remembering that he did **not** tell Severence or Kreager that he had injured himself at home.

Ultimate Findings

21. The ALJ finds the testimony of Severence and Kreager to be far more credible than that of the Claimant. Indeed, the ALJ finds that Claimant's testimony fraught with inconsistencies and improbabilities and, therefore, finds his testimony wholly lacking in credibility.

22. It is an understatement to state that the ALJ makes a rational choice, between conflicting testimony, to accept the testimony of Severence and Kreager and to reject the testimony of the Claimant.

23. The Claimant has failed to prove that it is more likely than not that he sustained a work-related injury on August 21, 2014 as he alleges. Consequently, the Claimant has failed to prove a compensable injury by preponderant evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85**The 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; 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 testimony of Severence and Kreager is far more credible than that of the Claimant. Indeed, as found, Claimant's testimony is fraught with inconsistencies and improbabilities and, therefore, his testimony is wholly lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a

particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between conflicting testimony, to accept the testimony of Severence and Kreager and to reject the testimony of the Claimant.

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, by a preponderance of the evidence that he sustained a work-related injury on August 21, 2014 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 October 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 October 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established that he suffered a compensable injury to his low back.

2. Whether Claimant is entitled to authorized medical treatment reasonably necessary to cure and relieve the effects of his injury.

3. Whether Claimant has established an entitlement to temporary total disability (TTD) benefits.

4. Whether Claimant has established an entitlement to temporary partial disability (TPD) benefits.

5. Determination of Claimant's average weekly wage.

6. Whether penalties are owed due to a violation of PALJ McBride's Order compelling discovery responses.

7. Whether Respondents are entitled to offsets and applicable credits against any temporary indemnity benefits, including the severance payments made to Claimant and unemployment benefits received by Claimant.

PROCEDURAL ISSUES

At the outset of hearing, Respondents' Motion to Reconsider Vacation of the Order Striking Claimant's December 31, 2014 Application for Hearing with Prejudice, dated June 16, 2015 was denied. At the time of the Settlement Agreement, Claimant had an existing workers' compensation claim. The Settlement Agreement purported to include and cover the workers' compensation claim and was thus subject to approval by an administrative law judge or by the Division of Workers' Compensation. Approval was not received nor was the settlement submitted for approval. Therefore, Respondent's motion was denied pursuant to § 8-43-204, C.R.S.

At the outset of hearing, a request was made to allow for two agents of ISG Investigations to testify. This request was granted. On June 5, 2015 an opposed motion was granted by ALJ Felter and allowed that a representative from ISG Investigations could be added as a witness for hearing. At hearing, Respondents presented with two different investigators from ISG who had both performed investigation of Claimant. Claimant objected arguing that ALJ Felter's order allowed

only one representative to testify. This was not found persuasive. Claimant had sufficient time to review the contents of the investigative report and to prepare a defense. Whether the contents of the report were written by one or two separate individuals is not crucial.

The video of surveillance was excluded from evidence as not timely exchanged during the discovery process. Despite the parties having exchanged the investigative reports with sufficient time for review, the actual video was not timely exchanged prior to hearing to provide Claimant with a sufficient opportunity to review and/or present a response.

Respondents' Opposed Motion to Add Issue dated June 19, 2015 was granted in part. It is noted that the written motion requested to add the issue of penalties for violation of PALJ McBride's April 16, 2015 Order regarding discovery responses and requested to add the issue of attorney's fees. Verbally at the outset of hearing, Respondent's requested adding not only the two issues outlined above, but also that the court find and order penalties as a sanction against Claimant for insufficient interrogatory responses. The request to add the issue of penalties and attorneys fees as issues for hearing was granted. The request for any type of sanction for alleged insufficient interrogatory responses was denied. Respondents did not submit any motion to compel further responses to interrogatories and had sufficient time to do so prior to hearing if they felt that the responses were insufficient.

Mid-Hearing, Respondents' Motion for Directed Verdict and Claimant's Counter-Motion for Directed Verdict were both denied.

FINDINGS OF FACT

1. Claimant began working for Employer in approximately May of 2013 as a medical supply delivery driver. Claimant's duties included loading carts of medical supplies onto a delivery truck, driving the delivery truck to different medical buildings, unloading the carts, pushing the carts full of supplies to the destination, and loading the carts back onto the truck.

2. The carts that Claimant loaded and delivered were hand carts and varied in weight depending on the medical supplies that were being delivered. The heaviest carts were the carts that were stacked with IV solution that could weigh up to 2,000 pounds.

3. In approximately July of 2014 Claimant began experiencing low back pain while at work and while pushing and pulling the carts.

4. On September 30, 2014 Claimant's back pain had become unbearable and he reported it as a work injury.

5. Claimant alleges that as a result of working for Employer and due to the frequent pushing, pulling, and force required to move the carts, he developed low back pain as an occupational disease.

6. Claimant admitted that he had prior low back pain while working at Abra Auto Body approximately five years ago. At that time Claimant was detailing cars and his job required frequent bending. He developed low back pain at Abra, was treated with physical therapy, and his low back pain resolved. Claimant was able to work full duty with no restrictions after his low back pain resolved and has had no low back pain between the occurrence at Abra and the occurrence while employed by Employer.

7. After reporting his injury, Claimant was sent by Employer to Aviation & Occupational Medicine for treatment.

8. On October 2, 2014 Claimant was evaluated at Aviation & Occupational Medicine by Michael Ladwig, M.D. Claimant reported pushing carts with IV fluids that weighed 2,000 pounds constantly through parking lots and that it had caused a mid-low back injury. Claimant also reported having had issues with his lower back in the past. Dr. Ladwig noted X-rays were taken of the dorsal and lumbar spine and were negative for acute changes. On examination Dr. Ladwig noted that the dorsal and lumbar spine inspection noted mild tenderness at T10-S1 bilaterally and that Claimant's forward flexion showed decreased range of motion. Dr. Ladwig assessed dorsal strain and lumbosacral strain and opined that based on the patient history, mechanism of injury, and objective findings on examination there was greater than a 51% probability that the back injury was a work related injury or condition. *See* Exhibit 4.

9. Dr. Ladwig provided a return to work release with work restrictions of no lifting over 10-20 pounds, and no pushing or pulling over 50-60 pounds. Dr. Ladwig also referred Claimant for physical therapy evaluation and treatment. *See* Exhibit 4.

10. Claimant returned to work consistent with the work restrictions imposed by Dr. Ladwig. Employer placed Claimant in a STAT delivery car where his duties changed from loading, unloading, and driving a delivery truck full of carts with medical supplies to driving a Prius-type vehicle with smaller coolers or smaller medical supply items for delivery.

11. Claimant continued to receive his normal wages during this time period and received his normal wages through December 31, 2014. From January 1, 2014 through December 31, 2014 Claimant was paid total gross wages of $31,110.74. *See* Exhibit 7, Exhibit P.

12. As a STAT driver, there was frequent "down time" between delivering items. During this "down time" employees were required to check in with Employer's dispatcher and advise they had completed a delivery and were free for the next delivery. If no new delivery was ready, the drivers would read and/or do other things in their "down time."

13. Sometime in October or November of 2014, Claimant's supervisor approached his STAT car to verbally reprimand Claimant for reading when Claimant had not checked back in with the dispatcher advising the dispatcher he was free. Claimant maintains he did contact the dispatcher to check in. His supervisor maintains that he did not. The dispatcher was not called as a witness. The reprimand was not put in writing or made party of Claimant's employment file.

14. On October 20, 2014 Respondents filed a Notice of Contest based on further investigation for Claimant statement medical records. *See* Exhibit 3.

15. On October 22, 2014 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig continued Claimant's work restrictions and provided a referral to Rehabilitation Associates of Colorado for further evaluation and treatment of Claimant's low back. *See* Exhibit 4.

16. On October 29, 2014 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that the insurance company had denied Claimant's claim and that Claimant did not go see the specialist. Dr. Ladwig opined that Claimant needed a specialist referral. Dr. Ladwig continued Claimant's work restriction of lifting no greater than 10-20 pounds. *See* Exhibit 4.

17. On November 12, 2014 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that the claim was still being contested and that the referral could not be processed. Dr. Ladwig noted that Claimant reported working on the patio and that he may have re-aggravated the injury. Dr. Ladwig continued the work restriction of no lifting greater than 20 pounds and added a new restriction of avoiding forward bending. *See* Exhibit 4.

18. On November 21, 2014 Claimant's supervisor advised him that he would need to report to the mailroom starting on November 24, 2014 to sort mail and to work within his work restrictions. *See* Exhibit J.

19. On December 1, 2014 Employer provided Claimant a written modified duty job offer. The modified duty entailed: sorting all incoming and outgoing mail; administrative duties such as putting labels on files, creating mailing lists from business cards of doctors; preparing mail tubs for route drivers; assisting with paperwork; and putting stat tickets on bins at the other end of the warehouse. Dr. Ladwig signed off on the modified duty job offer and noted his approval and that Claimant needed to avoid forward bending and needs position changes sit/stand/walk every 30 minutes. *See* Exhibit K.

20. Claimant worked in the mail room until December 17, 2014.

21. On December 3, 2014, while working in the mail room, Claimant received an Employee Warning Notice. Claimant had a box-cutter knife in his possession. The

description of the incident indicated that Claimant had a knife in his possession while sorting mail in the mail room which was a violation of company policy regarding weapons in the workplace. It was noted that Claimant was instructed to leave any type of knife or weapon out of the office and that a violation of this type in the future or a violation of any other company policy might result in additional disciplinary action up to and including job consequences and or termination. It was noted that this was a first warning for Claimant. *See* Exhibit L.

22. Claimant testified that the weapon was a box cutter and that he used it while in the mail room to cut plastic wrapping. Claimant testified that as soon as he received the warning, he discontinued bringing the box-cutter to work.

23. On December 10, 2014 Claimant received an Employee Warning Notice for substandard work. The description of the incident indicated that Claimant was not sorting the mail the way he was trained, had been combining the flaps up and sealed mail, was mixing the stamped mail in with the unmetered mail, and mixing the typed mail with the hand written mail. Claimant's supervisor indicated he had verbally instructed and showed Claimant several times how to correct the problems and that Claimant would pay closer attention and take more time to ensure proper mail sorting. *See* Exhibit M.

24. On December 17, 2014 Claimant was laid off from employment. Claimant was laid off by Employer as Employer was no longer to accommodate Claimant's work restrictions. Claimant was paid his normal wages through December 31, 2014.

25. On December 23, 2014 Claimant and Employer signed a Separation Agreement. The agreement provided Claimant's employment ended on December 17, 2014, that Employer was submitting a check to Claimant for wages between December 16, 2014 and December 31, 2014 even though Claimant worked only 2 days during that pay period, and that the separation would be documented by Employer as a permanent layoff. *See* Exhibit N.

26. The Separation Agreement provided that in exchange for Claimant's agreement to the Separation Agreement, Employer would pay Claimant severance pay in the gross amount of $4,000.00, to be paid in one installment on January 5, 2015. The Separation Agreement provided that Claimant released Employer from any and all causes of actions, claims, demands, damages, expenses, charges, complaints, obligations, and liability of any nature or kind whatsoever on account of, or in any way growing out of, his employment with or separation from employment with Employer, whether such liability or damages are accrued or un-accrued, known or unknown at this time…and that Claimant is giving up any right to sue Employer for any reason, including those related to Claimant's employment with Employer or the conclusion of that Employment. *See* Exhibit N.

27. At the time the Separation Agreement was signed by the parties, Claimant had an open workers' compensation claim that was under contest and he had been

receiving treatment. Employer intended for the Separation Agreement to include the release from liability for any workers' compensation claim responsibility. Despite this intent, the Separation Agreement was not filed with the Division of Workers' Compensation nor was it approved by the Division or an ALJ.

28. Claimant was very relieved and happy to receive his normal wages through the end of December as well as the $4,000.00 severance pay.

29. Claimant looked for other employment within his work restrictions and immediately found a position performing security duties.

30. On January 4, 2015 Claimant was hired to perform security services for the National Western Stock Show in Denver, Colorado. Claimant was able to perform his job duties within his work restrictions. Claimant worked, riding in a golf cart around the property, for the entire month of January. From January 5, 2015 through January 18, 2015 Claimant was paid total gross wages of $1,978.11. From January 19, 2015 through February 1, 2015 Claimant was paid total gross wages of $1,211.68. *See* Exhibit E.

31. On February 12, 2015 Claimant underwent an Independent Medical Evaluation performed by Gretchen Brunworth, M.D. Claimant reported four to five years prior he had achy low back pain while working for Abra Auto Body. Claimant reported that after physical therapy his problem resolved and he went back to full duty with no problems. Claimant reported that in July of 2014 after working for Employer for approximately one year and four months, he developed achiness in his low back and breathing problems when he had to perform heavy pushing activities. Claimant reported while loading and unloading trucks he did quite a bit of lifting and pushing/pulling of heavy carts. Claimant reported from July to September his pain waxed and waned but by September 30, 2014 it became too much and he reported it to his supervisor. Claimant reported he continued to have fairly constant pain across his low back that is worse with bending forward. *See* Exhibit 6.

32. Claimant reported his job involved lifting up to 45 pounds and pushing/pulling a cart that could weigh up to 2,500 pounds. Claimant reported he inspected the carts and supplies, loaded them onto his truck, and drove around town making deliveries. Claimant reported on a busy day he made 19 to 20 deliveries and on a light day he made 6 to 7 deliveries. *See* Exhibit 6.

33. On physical examination Dr. Brunworth noted that Claimant had minimal soreness on palpation of the bilateral lumbar paraspinal muscles, the lower lumbar facet joints and the bilateral PSIS with no muscle spasms. Dr. Brunworth noted that Claimant had moderate deficits in flexion with significant low back pain with flexion and minimal deficits in extension and lateral flexion. Dr. Brunworth diagnosed low back pain with complaints suggestive of L4 radiculopathy. Dr. Brunworth opined that it was probable that Claimant's low back condition is related to his work activity and possible that he has pathology at the L3-4 level. She recommended proceeding with an MRI and noted that

further treatment would be dependent upon the results of the MRI. Dr. Brunworth opined that treatment for the lumbar strain is related to the work injury, that Claimant could return to work with a restriction of maximum lifting of 20 pounds and that Claimant was not yet at maximum medical improvement. *See* Exhibit 6.

34. In late April and early May of 2015, surveillance was conducted on Claimant. Claimant was observed mowing two different lawns, pushing and helping lift/unload a carpet cleaning machine, shopping, and otherwise performing normal activities of daily living without difficulty. It is unclear if any force or weights of items lifted by Claimant were in excess of his 20 pound lifting restriction.

35. On April 16, 2015 a Prehearing Conference Order issued by PALJ McBride was served upon the parties. The Order required that Claimant respond to discovery no later than seven days following the date the order was served on Claimant's counsel. *See* Exhibit D.

36. On June 5, 2015 Claimant provided Claimant's Answer to Respondents' Interrogatories and Request for Essential Information. The responses were due pursuant to PALJ McBride's Order on April 23, 2015. The responses were thus 43 days late.

37. Claimant's testimony overall is found credible and persuasive. Although Claimant provided some inconsistencies in reports to medical providers surrounding the heaviest carts that he pushed and pulled, Claimant was credible and forthcoming in his hearing testimony that the carts weighed anywhere from 200 to 2000 pounds depending on the items being delivered. Claimant presented consistently, credibly, and openly discussed prior injuries and his current pain.

38. The testimony of Claimant's supervisor is not found as credible or persuasive.

39. The medical opinions of Dr. Ladwig and Dr. Brunworth that the injury to Claimant's low back is work related is also found credible and persuasive. There is sufficient medical documentation to support their conclusions.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934

P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner, supra*.

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. *See* § 8-40-201(14) C.R.S. 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.*

Claimant has established by a preponderance of the evidence that his low back condition resulted directly from his employment and the conditions under which he performed his job. The medical opinions of Dr. Ladwig and Dr. Brunworth are found credible and persuasive that Claimant's low back symptoms and pain, more likely than not, was caused by his employment. In his employment Claimant regularly pushed carts full of medical supplies and loaded the carts onto and off of a delivery truck. The carts weighed between 200 and 2,000 pounds when fully loaded for deliveries. The repetitive pushing and pulling of the carts more likely than not caused Claimant's back to become symptomatic over time and leading up to September 30, 2014. Regularly pushing and pulling stacked carts full of medical supplies and using significant force is not something Claimant would normally do or be exposed to in everyday life. Rather, the repetitive pushing and pulling heavy carts was particular to this job and his job requirements of delivering medical supplies. Claimant has therefore met his burden to show that his job duties proximately caused his low back pain. Although Claimant had low back pain previously, at the time he began employment with Employer he was asymptomatic and did not have any symptoms of low back pain until over one year after he began pushing and pulling the carts full of medical supplies. The ALJ defers to the medical opinions provided by Dr. Ladwig and Dr. Brunworth that given the duties and the diagnosis, it is more likely than not that Claimant's injury is work related.

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*, 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. Donavan*, 939 P .2d 496 (Colo. App. 1997).

Claimant has established that he suffered a compensable injury to his low back. Therefore, the Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Claimant has received treatment from Employer's authorized provider Dr. Ladwig. Claimant has shown that he is entitled to continue to receive treatment with this authorized provider and that Respondents remain liable to provide treatment including any further referrals or testing that are reasonably necessary to cure and relieve the effects of his industrial injury.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Section 8-42-105(3), C.R.S. provides that temporary total disability benefits shall continue until the first occurrence of any one of the following: 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 such employment.

Claimant has failed to meet his burden to show an entitlement to TTD benefits. Initially, Claimant has failed to establish that he suffered a wage loss at any point while employed by Employer subsequent to reporting his injury. Rather, after reporting his injury and receiving work restrictions from Dr. Ladwig, Employer accommodated those restrictions and paid Claimant normal wages. Claimant did not suffer any wage loss and returned to modified employment immediately following his report of the work injury. Claimant ceased working for Employer on December 17, 2014, but Employer continued to pay Claimant his normal wages through December 31, 2014. Therefore, Claimant has failed to establish that he suffered any wage loss causally connected to his work related injury through December 31, 2014.

As found above, as of December 17, 2014 Employer was unable to continue to accommodate Claimant's work restrictions. For that reason Claimant was laid off and Employer and Claimant entered into a separation agreement. Had Claimant been unable to find employment within his work restrictions after his separation agreement and had he suffered wage loss in January, he would arguably have an entitlement to TTD benefits beginning January 1, 2015 since his Employer terminated his employment as they were unable to accommodate his restrictions. However, as found above, Claimant began employment with the National Western Stock Show on January 4, 2015. Claimant essentially never became temporarily totally disabled. After being paid full wages through December 31, 2014 by Employer, Claimant again started earning wages just a few days later when he began employment with the National Western Stock Show. Claimant's injury did not cause him to miss more than three work shifts nor did it cause him to suffer lost wages and he did not become temporarily and totally disabled due to his injury. Although Claimant has not shown an entitlement to TTD benefits, nevertheless, any entitlement would have ended upon his return to regular or modified employment per § 8-42-205(3), C.R.S. when he started work on January 4, 2015 at the National Western Stock Show.

On his application for hearing Claimant requested TTD benefits from September 30, 2014 and ongoing. In his argument he requested TTD benefits from December 17, 2015 and ongoing. Claimant has failed to establish by a preponderance of the evidence that he is entitled to TTD benefits from September 30, 2014 and ongoing or from December 17, 2015 and ongoing. It is noted that Claimant suffered no wage loss through December 31, 2014. Further, he continued to be employed even after Employer laid him off for being unable to accommodate his work restrictions. Claimant not only returned to modified duty with Employer immediately after reporting his work injury, but even after Employer was no longer able to accommodate his restrictions, he returned to modified duty when hired on January 4, 2015 by the National Western Stock Show. Claimant has failed to show by a preponderance of the evidence that he is temporarily totally disabled, incapable of earning wages within his work restrictions, or that he is entitled to TTD benefits.

Temporary Partial Disability

Claimant has also failed to establish an entitlement to TPD benefits. Claimant did not suffer any difference between his average weekly wage at the time he reported the injury on September 30, 2014 and during his continued employment with Employer through December 17, 2014. Claimant continued to work, within his work restrictions, his full schedule and he received his full wages. Claimant continued to receive full wages through December 31, 2014. After Claimant's employment ended as Employer could no longer accommodate his restrictions, Claimant immediately began new employment with a different employer, also within his work restrictions, and Claimant earned more money at the new employment than he had while working for Employer. Claimant has failed to establish that his work restrictions caused him to suffer any loss of or difference between his average weekly wage at the time of his injury and his average weekly wage during any continuance of temporary partial disability.

Temporary partial disability payments ordinarily continue until either Claimant reaches maximum medical improvement or an attending physician gives Claimant 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. *See* 8-42-106, C.R.S. Here, Claimant began modified employment immediately after reporting his work injury and in his modified employment he worked his full schedule and received full wages. Claimant also continued to work within his work restrictions at a different employer beginning in early January of 2015 with no loss of wages, and in fact an increase in wages. Claimant has failed to establish that he was entitled to TPD at any point during his claim or ongoing as he is not temporarily partially disabled nor has he shown that his work restrictions prevent him from obtaining employment. Claimant has failed to establish that his injury caused him to be temporarily disabled and unable to earn wages, either totally or partially. Rather, there is substantial evidence that despite suffering a compensable injury, Claimant was capable of earning wages immediately after reporting his injury and continuing for several months and that he continues to be capable of earning wages. Therefore, Claimant has failed to establish any entitlement to disability benefits.

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 parties submitted wage records as evidence but did not outline their positions in position statements as to their suggested or proposed average weekly wage. From the evidence submitted by the parties, Claimant earned a total of $31,110.74 from January 1, 2014 through December 31, 2014. Claimant's was paid hourly and his average weekly wage varied from week to week based on the number of regular and overtime hours that he worked. The ALJ concludes that to reach a fair approximation of his average weekly wage it is proper to take Claimant's total gross earnings during this year and divide by 52 weeks. This amounts to an AWW of $598.28 which is a fair approximation of what Claimant earned weekly.

Penalties and Attorney's Fees

Section 8-43-304(1) authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* § 8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if he leaves undone that which is mandated by an order. A person refuses to comply with an order if he withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003).

As found above, PALJ McBride issued an Order on April 16, 2015 requiring that Claimant provide responses to discovery by April 23, 2015. Claimant did not comply with the order, and submitted his response to interrogatories on June 5, 2015, 43 days past the deadline. This is a violation of § 8-43-304(1). Claimant failed to offer a reasonable explanation for his delay and his failure to comply with PALJ McBride's Order. Claimant's actions in failing to comply with the Order were objectively unreasonable. The violation of the Order and the delay, although objectively unreasonable, is not found to be significant. Although Respondents argue that this violation affected the Respondents' ability to properly prepare for the June 25, 2015 hearing, this is not persuasive. The late responses provided in Claimant's response to interrogatories contained information that for the most part had been previously contained in medical reports, reports to the Employer, and for the most part the information was already in Respondents' possession. Although the delay was a violation of an order, the penalties that are appropriate for the type of violation are minimal. The ALJ determines that a penalty of $5/day for a total penalty of $215 is appropriate in this case. The penalty shall be apportioned between the Respondent and the Workers' Compensation Cash Fund with 50 percent of the penalty paid to Respondents and 50 percent paid to the Workers' Compensation Cash Fund.

Respondents did not present sufficient information for the ALJ to impose any attorney's fees. The only document that could purport to be appropriate for imposition of attorneys fees is the very short motion requesting the same. The ALJ concludes, absent sufficient evidence, that there is no basis to impose attorney's fees in this matter.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show that he suffered a compensable injury to his low back.

2. Claimant is entitled to authorized medical treatment that is reasonably necessary to cure and relieve the effects of his low back injury.

3. Claimant has failed to establish an entitlement to temporary total disability benefits. His claim for temporary total disability is denied and dismissed.

4. Claimant has failed to establish an entitlement to temporary partial disability benefits. His claim for temporary partial disability is denied and dismissed.

5. Claimant's average weekly wage is $ 598.28.

6. Respondents have established that Claimant violated the order of PALJ McBride and is subject to penalties pursuant to § 8-43-304(1) C.R.S. Penalties in the amount of $215.00 are ordered.

7. Claimant shall pay a penalty of $107.50 to Respondents.

8. Claimant shall pay a penalty of $107.50 to the Workers' Compensation Cash Fund. Claimant shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: Claimant shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

9. Respondents' request for attorney's fees is denied and dismissed.

10. Respondents' request for offsets and applicable credits against any temporary indemnity benefits ordered is denied as moot as no temporary total or temporary partial disability benefits are owed in this matter.

10. Any issues not determined herein are reserved for future determination.

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

DATED: October 9, 2015

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury to his right knee during the course and scope of her employment with Employer on October 8, 2014.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits for his October 8, 2014 industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 9, 2014 until May 27, 2014.

4. Whether Respondents have demonstrated 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").

STIPULATIONS

The parties agreed to the following:

1. On September 23, 2014 Claimant sustained a compensable lower back injury during the course and scope of his employment with Employer.

2. Claimant received reasonable, necessary and related medical treatment for his September 23, 2014 lower back injury.

3. Claimant earned an Average Weekly Wage (AWW) of $1,165.25.

FINDINGS OF FACT

1. Claimant is a 63 year old male who was employed by Employer as a Sheet Rock Worker and Painter. On September 23, 2014 Claimant suffered an admitted industrial injury to his lower back when he fell backwards and tripped over tools at a job site (Case No. 4-964-211).

2. Claimant obtained medical treatment from Craig Anderson, M.D. at Midtown Occupational Medicine. He was diagnosed with an acute lumbar strain. Dr. Anderson assigned work restrictions that included no climbing.

3. Claimant did not miss any time from work. Owner of Employer and Safety Manager Beth Lundquist confirmed that Claimant did not miss work after his September 23, 2014 lower back injury.

4. When Ms. Lundquist became aware that Claimant had work restrictions and was reducing his hours, she prepared a modified job offer. She presented the modified job offer to Claimant on October 2, 2014 and the position had a start date of October 10, 2014. The modified position was based on the restrictions that had been assigned by Claimant's treating physicians. Dr. Anderson approved the various job duties delineated in the modified job offer.

5. On October 8, 2014 Claimant visited Marc Steinmetz, M.D. at Midtown Occupational Medicine for an evaluation of his lower back condition. However, Claimant reported that he had been suffering from a fever for four days and was experiencing right knee pain (Case No. 4-965-372). The record does not reveal that Claimant associated his right knee symptoms with his work activities for Employer. Dr. Steinmetz determined that Claimant might be suffering from a sepsis and an infected right knee. He directed Claimant to the Denver Health Emergency Room for an examination.

6. Claimant visited the Denver Health Emergency Room and reported right knee pain, fever and urinary incontinence. A physical examination revealed redness, warmth, pain and swelling associated with Claimant's right knee. Claimant was diagnosed with a right knee septic bursitis and received antibiotics. The medical records do not reflect any association between Claimant's right knee symptoms and his work activities for Employer.

7. On October 9, 2014 Claimant returned to Dr. Steinmetz for an examination. Claimant related his right knee symptoms to the onset of his fever. He reported that he had received antibiotics at the Denver Health Emergency Room and his incontinence had resolved. Dr. Steinmetz diagnosed Claimant with a right knee bursitis infection that was not work-related. He explained that Claimant "has not been doing regular work or kneeling for several weeks and he did not hurt his knee when he fell." Dr. Steinmetz instructed Claimant to remain mostly sitting at work until a primary care physician released him to full duty employment. Ms. Lundquist was present at the evaluation and aware of the instructions.

8. Although Claimant was required to obtain medical clearance for his right knee condition before he could return to work, he repeatedly reported to Employer without a medical release for his right knee and sought to work in his modified capacity. Employer responded that Claimant was required to produce a release from a physician before he could return to work. Nevertheless, Claimant returned to work approximately every other day for 10 days without providing the documentation.

9. On October 27, 2014 Ms. Lundquist terminated Claimant from employment because he failed to provide a medical release for his right knee condition. She noted that Claimant was eligible to be rehired by Employer if he returned with the

documentation. The reason for the termination was documented as “no show/no call.” The termination was retroactive to October 8, 2014.

10. On January 12, 2015 Claimant underwent an evaluation with Larry Lesnak, D.O. Claimant associated his development of right knee symptoms with climbing scaffolding while performing his job duties. He specifically reported that he was attempting to climb scaffolding by placing direct pressure on his right knee on a scaffolding bar. Claimant noted that he immediately experienced right knee pain and swelling. Upon examination Claimant did not exhibit any right knee joint effusions and had full range of motion. Dr. Lesnak characterized Claimant’s right knee symptoms as “subjective complaints of occasional right lateral/medial knee pains.” He diagnosed Claimant with “possible intermittent symptomatic right knee osteoarthritis” and concluded that his right knee condition was not work-related.

11. On March 3, 2015 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes diagnosed Claimant with the idiopathic onset of a right knee prepatellar bursal infection that resolved with antibiotics. He explained that the condition was idiopathic because it was not likely caused by climbing scaffolding. Dr. Hughes noted that Claimant’s type of bursal infection can occur suddenly and spontaneously. The infections are located most commonly over the “olecranon bursa of the elbow and the prepatellar bursa of the knee.” Dr. Hughes determined that Claimant’s right knee symptoms did not constitute a work-related condition. He summarized that Claimant’s “right knee prepatellar bursal infection was idiopathic and not related to his fall on September 23, 2014 or to other work-related activities proximate to the onset of this problem on October 8, 2014.”

12. On March 18, 2015 Claimant underwent an independent medical examination with Caroline Gellrick, M.D. He reported that he was required to use his right knee to kneel on the scaffolding at work because of his lower back injury. Dr. Gellrick determined that Claimant sustained an injury to his right knee as a result of kneeling on the scaffolding at work. She detailed that kneeling on the scaffolding flared Claimant’s right knee bursitis and underlying degenerative changes to cause septic bursitis. Claimant was thus required to obtain medical treatment from Denver Health. Dr. Gellrick remarked that the treatment was reasonable, necessary and related to his work-related right knee injury.

13. Claimant did not work after his termination until he reached Maximum Medical Improvement (MMI) for his lower back condition and was released to full duty on May 28, 2015. He received unemployment benefits of $700.00 every two weeks for approximately two months from a previous employer.

14. Claimant testified at the hearing in this matter. He maintained that he injured his right knee at work because he was required to use his right knee to climb scaffolding as a result of his September 23, 2014 admitted lower back injury. Claimant also remarked that he did not know he could be terminated for failing to obtain a medical release from a physician for his right knee condition.

15. Ms. Lundquist testified at the hearing in this matter. She explained that there were handrails on the relatively short scaffolding that Claimant used to complete his job duties. Therefore, Claimant was not required to apply pressure to his right knee in ascending the scaffolding. Ms. Lundquist also commented that she repeatedly told Claimant that he needed to provide a fitness-for-duty release for his right knee condition prior to returning to work for Employer. She gave Claimant two weeks but he failed to supply the medical release and was terminated.

16. Dr. Hughes testified at the hearing in this matter. He maintained that Claimant's right knee prepatellar bursal infection was not caused by his work activities for Employer. He explained that Claimant had not suffered any trauma or aggravation to his right knee while working on the scaffolding that was sufficient to cause bursitis and an infection. Dr. Hughes acknowledged that jobs such as a tile setter or carpet layer can cause bursitis. However, nothing in Claimant's description of his work activities on October 8, 2014 constituted a sufficient exposure to cause his right knee prepatellar bursal infection. Dr. Hughes also commented that Claimant was not suffering from a pre-existing condition that was aggravated by his work activities on October 8, 2014. He noted that Claimant's right knee prepatellar bursal infection likely arose spontaneously. Dr. Hughes remarked that a spontaneous infection of the knee bursa, in the absence of aggravating factors, is a common presentation.

17. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right knee injury during the course and scope of his employment with Employer on October 8, 2014. Claimant attributed his right knee symptoms to climbing scaffolding while performing his job duties. He specifically reported that he was attempting to climb scaffolding by placing direct pressure on his right knee on a scaffolding bar. Claimant noted that he was required to use his right knee to kneel on the scaffolding at work because of his lower back injury. However, Ms. Lundquist credibly explained that there were handrails on the relatively short scaffolding that Claimant used to complete his job duties. Therefore, Claimant was not required to apply pressure to his right knee in ascending the scaffolding. Moreover, Claimant's initial medical records do not reflect any connection between Claimant's right knee symptoms and his work activities for Employer.

18. The medical evidence also demonstrates that Claimant's work activities for Employer did not cause his right knee condition. Dr. Hughes persuasively maintained that Claimant's right knee prepatellar bursal infection was not caused by his work activities for Employer. He explained that Claimant had not suffered any trauma or aggravation to his right knee while working on the scaffolding that was sufficient to cause bursitis and an infection. Dr. Hughes acknowledged that jobs such as a tile setter or carpet layer can cause bursitis. However, nothing in Claimant's description of his work activities on October 8, 2014 constituted a sufficient exposure to cause his right knee prepatellar bursal infection. Dr. Hughes also commented that Claimant's knee condition was likely idiopathic and any pre-existing condition was not aggravated by his work activities for Employer. Furthermore, Drs. Steinmetz and Lesnak concluded that

Claimant's right knee infection was not caused by his work activities for Employer on October 8, 2014.

19. In contrast, Dr. Gellrick determined that Claimant's right knee symptoms were caused by his work activities. Dr. Gellrick explained that Claimant sustained an injury to his right knee as a result of kneeling on the scaffolding at work. She detailed that kneeling on the scaffolding flared Claimant's right knee bursitis and underlying degenerative changes to cause septic bursitis. However, Dr. Gellrick's analysis is speculative because it fails to consider the actual mechanics of Claimant's activities in climbing the scaffolding. As Dr. Hughes remarked, a spontaneous infection of the knee bursa in the absence of aggravating factors, is a common presentation. The coincidental correlation between Claimant's work and his symptoms is insufficient to establish a causal connection between his injury and work activities. Accordingly, the persuasive testimony and medical records reveal that Claimant's work activities on October 8, 2014 did not aggravate, accelerate or combine with any pre-existing right knee condition to cause a need for medical treatment.

20. Respondents have established that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under the termination statutes. On October 9, 2014 Dr. Steinmetz instructed Claimant to remain mostly sitting at work until a primary care physician released him to full duty employment. Ms. Lundquist was present at the evaluation and aware of the instructions. Although Claimant was required to obtain medical clearance for his right knee condition before he could return to work, he repeatedly reported to Employer without a medical release and sought to work in his modified capacity. Employer responded that Claimant was required to produce a release from a physician before he could return to work. Ms. Lundquist commented that she repeatedly told Claimant that he needed to provide a fitness-for-duty release for his right knee condition prior to returning to work for Employer. Nevertheless, Claimant returned to work approximately every other day for 10 days without a medical release for his right knee condition. On October 27, 2014 Ms. Lundquist terminated Claimant from employment because he failed to provide a medical release for his right knee condition. She noted that Claimant was eligible to be rehired by Employer if he returned with a medical release for his right knee. The termination was retroactive to October 8, 2014. Although Claimant testified that he did not know he could be terminated for failing to obtain a medical release from a physician, the record contains significant credible evidence that Claimant was repeatedly apprised that he needed to obtain a physician's release or he could not work for Employer. Claimant precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence"

of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on October 8, 2014. Claimant attributed his right knee symptoms to climbing scaffolding while performing his job duties. He specifically reported that he was attempting to climb scaffolding by placing direct pressure on his right knee on a scaffolding bar. Claimant noted that he was required to use his right knee to kneel on the scaffolding at work because of his lower back injury. However, Ms. Lundquist credibly explained that there were handrails on the relatively short scaffolding that Claimant used to complete his job duties. Therefore, Claimant was not required to apply pressure to his right knee in ascending the scaffolding. Moreover, Claimant's initial medical records do not reflect any connection between Claimant's right knee symptoms and his work activities for Employer.

8. As found, the medical evidence also demonstrates that Claimant's work activities for Employer did not cause his right knee condition. Dr. Hughes persuasively maintained that Claimant's right knee prepatellar bursal infection was not caused by his work activities for Employer. He explained that Claimant had not suffered any trauma or aggravation to his right knee while working on the scaffolding that was sufficient to cause bursitis and an infection. Dr. Hughes acknowledged that jobs such as a tile setter or carpet layer can cause bursitis. However, nothing in Claimant's description of his work activities on October 8, 2014 constituted a sufficient exposure to cause his right knee prepatellar bursal infection. Dr. Hughes also commented that Claimant's knee condition was likely idiopathic and any pre-existing condition was not aggravated by his work activities for Employer. Furthermore, Drs. Steinmetz and Lesnak concluded that Claimant's right knee infection was not caused by his work activities for Employer on October 8, 2014.

9. As found, in contrast, Dr. Gellrick determined that Claimant's right knee symptoms were caused by his work activities. Dr. Gellrick explained that Claimant sustained an injury to his right knee as a result of kneeling on the scaffolding at work. She detailed that kneeling on the scaffolding flared Claimant's right knee bursitis and underlying degenerative changes to cause septic bursitis. However, Dr. Gellrick's analysis is speculative because it fails to consider the actual mechanics of Claimant's activities in climbing the scaffolding. As Dr. Hughes remarked, a spontaneous infection of the knee bursa in the absence of aggravating factors, is a common presentation. The coincidental correlation between Claimant's work and his symptoms is insufficient to establish a causal connection between his injury and work activities. Accordingly, the

persuasive testimony and medical records reveal that Claimant's work activities on October 8, 2014 did not aggravate, accelerate or combine with any pre-existing right knee condition to cause a need for medical treatment.

Responsible for Termination

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

11. As found, 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 the termination statutes. On October 9, 2014 Dr. Steinmetz instructed Claimant to remain mostly sitting at work until a primary care physician released him to full duty employment. Ms. Lundquist was present at the evaluation and aware of the instructions. Although Claimant was required to obtain medical clearance for his right knee condition before he could return to work, he repeatedly reported to Employer without a medical release and sought to work in his modified capacity. Employer responded that Claimant was required to produce a release from a physician before he could return to work. Ms. Lundquist commented that she repeatedly told Claimant that he needed to provide a fitness-for-duty release for his right knee condition prior to returning to work for Employer. Nevertheless, Claimant returned to work approximately every other day for 10 days without a medical release for his right knee condition. On October 27, 2014 Ms. Lundquist terminated Claimant from employment because he failed to provide a medical release for his right knee condition. She noted that Claimant was eligible to be rehired by Employer if he returned with a medical release for his right knee. The termination was retroactive to October 8, 2014. Although Claimant testified that he did not know he could be terminated for failing to obtain a medical release from a physician, the record

contains significant credible evidence that Claimant was repeatedly apprised that he needed to obtain a physician's release or he could not work for Employer. Claimant precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment.

ORDER

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

1. Claimant's request for Workers' Compensation benefits for his October 8, 2014 right knee condition is denied and dismissed (Case No. 4-965-372).

2. Claimant is precluded from receiving TTD benefits after October 8, 2014 because he was responsible for his termination from employment.

3. Claimant earned an AWW of $1,165.25.

4. 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: October 22, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-966-545-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee and ankle on March 15, 2014.Whether Claimant sustained compensable injuries during the course and scope of her employment with Employer.

2. Whether Claimant is entitled to reasonable and necessary medical treatment.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage was $378.46.

FINDINGS OF FACT

1. Claimant is employed by Interstate Cleaning Corporation as a janitorial worker and was working there at all times relevant to this proceeding. Claimant's primary language is Spanish, and she does not speak English.

2. On March 15, 2014, Claimant was operating a "scrubber" machine to scrub the floors of a Target store. As she was stepping off the scrubber to change the water, she fell, twisted her right ankle and felt pain in her right knee.

3. Claimant did not immediately report the accident to anyone other than her husband, Eugenio Alvarado, who also worked there at the time. He heard her yell, saw her on the ground on her left side, and helped her get up.

4. Claimant kept working and finished her shift after this incident. She continued to work for six months before reporting her injury to Employer, hoping during that time that her knee and ankle pain would improve. Her pain worsened, however, especially in her knee.

5. Claimant did not report the injury sooner because she was afraid she would lose her job. She was an undocumented worker at that time, and she feared she would lose her job if Employer discovered that fact. Also, Claimant was the lead janitorial worker of a crew that was made up entirely of her close family members. She did not report her injury sooner because she feared their jobs may be put in jeopardy as well.

6. On August 15, 2014, Claimant had an appointment with her primary care physician, Dr. Elisa Melendez, for knee pain. Claimant did not tell Dr. Melendez that she hurt herself at work during that appointment.

7. Dr. Melendez requested an MRI of Claimant's knee, which Claimant underwent on September 8, 2014 at St. Joseph hospital. The MRI report states that Claimant had an "incomplete vertical tear in the anterior horn and body segment junction of medial meniscus."

8. Claimant saw Dr. Melendez again on or around September 25, 2014 to follow up on the MRI. Dr. Melendez's report from that appointment states:

> The patient reports that 6 months ago she sustained an injury to her right foot/knee after stepping down from a rider scrubber while at work. Patient reports that since that date of her injury, she has been experiencing increased knee/ankle pain and difficulty walking as well. She was sent to get an MRI of her knee which notes a medial meniscal tear.

9. Claimant first reported her injury to Employer in late September of 2014.

10. Henry Ariza was Claimant's supervisor. He credibly testified that as a lead worker, Claimant would have been trained on how to report workers' compensation claims, and would have known that employees are supposed to call him immediately when they have been injured on the job.

11. Prior to Claimant's March 15, 2014 injury, she had non-work related medical issues. Mr. Ariza was accommodating of those medical appointments.

12. Mr. Ariza further credibly testified that Clamant was a good employee and that Employer had treated her fairly in the past.

13. Mr. Ariza is not allowed to hire undocumented workers. If he were to discover that one of the employees he supervises was undocumented, he would have to report that fact to Employer.

14. After Claimant reported the March 15, 2014 injury to Mr. Ariza, Employer, through Mr. Ariza, immediately authorized Claimant to treat at Concentra Medical Center in Thornton, Colorado ("Concentra").

15. Claimant was seen by a physician at Concentra on October 1, 2014. The Concentra medical record for that appointment states:

> Injury history: Injury date: 3/15/14. This is the result of a fall and twisting. Occurred while at work. She stepped down off of riding waxing machine onto squeegee and twisted right ankle and right knee . . . Saw her PCP and reports she had an MRI of the knee showing a meniscus tear – sent here. 10/10 pain in right knee

> (anteromedial area) and 8/10 pain in right ankle (medial > lateral). Denies prior injuries to the areas. Still working. Radiology results: right foot – navicular fracture is old. Right ankle – old navicular fracture.

16. Claimant also had an x-ray of her right foot on October 1, 2014. The results indicated "…no evidence of fracture . . . no arthritic change…"

17. An October 7, 2014 Concentra report concerning Claimant stated:

> mechanism of injury: Pt reports that she was using a scooter at work. While getting off of it, her right foot twisted and she fell to the ground. She never reported her injury until recently. The injury occurred 3/15/14, but her knee pain got worse about two months ago….She had an MRI of the right knee that shows a partial medial meniscus tear and an x-ray of the foot that shows an old navicular fracture.

18. On November 10, 2014, Claimant saw Dr. Thomas Mann, an orthopedic surgeon at Cornerstone Orthopaedic and Sports Medicine, P.C., ("Cornerstone") who stated that she would be a candidate for arthroscopic repair of the medial meniscus, with debridement and chrondoplasty of the right knee joint.

19. Dr. Daniel L. Ocel, an orthopedic surgeon at Cornerstone, reviewed Claimant's first MRI. He recommended another MRI, which was performed on December 19, 2014 at North Denver Integrated Imaging. The second MRI report stated "a chronic complete tear of the anterior talofibular ligament is present."

20. On January 29, 2015, Claimant saw another Concentra physician, Dr. John Burris. Dr. Burris's report states in pertinent part:

> Patient states that she was stepping off a waxing machine at work on 3/15/2014 when she slipped striking her right foot against the machine. She did not fall to the ground. She did not seek medical attention until approximately 7 months later when she presented to her primary care physician for reported knee complaints. MRI was performed through her private insurance on September 8, 2014, showing incomplete vertical tear of the medial meniscus with chrondromalacia of the medial compartment and patellofemoral arthritis . . . It is difficult to believe that the event that she described on 3/15/2014 is the cause of her present pain complaints. All diagnostic testing has been consistent with degenerative changes and her overall deconditioning and body habitus.

21. Dr. Burris continued: "After today's encounter [1/29/2015], it is clear that this patient is heavily engaged in a secondary gain with regard to reported work event. As stated above, it is difficult for me to relate her present complaints with the reportedly minor event that occurred 10 months ago. Subsequent diagnostic testing has only shown degenerative changes consistent with her body habitus and was not likely caused by the event given the significant delay in seeking medical care."

22. Dr. Burris concluded: "I cannot causally relate her present pain with the reported history of striking her foot on an adjacent machine."

23. Claimant did not strike her foot on an adjacent machine.

24. Dr. Mark Paz performed an IME on Claimant on behalf of Respondents. Dr. Paz is Level II accredited, and was deemed an expert in occupational and internal medicine at hearing. On March 11, 2015, Dr. Paz met with Claimant, and afterward he reviewed her medical records.

25. In his report Dr. Paz wrote "on March 15, 2014 she was operating a floor cleaning machine called a green machine. To operate it she had to sit on it and drive it. As she was stepping off of it she slipped and fell to the floor. The machine is 2 feet above the ground and she has to jump off the machine. It does not have a step to get off of it."

26. Dr. Paz assessed Claimant with right knee degenerative joint disease and right knee medial meniscal tear.

27. Concerning causation, Dr. Paz concluded that:

> Considering the direct history provided by [Claimant] during today's evaluation, findings on physical examination, and review of the prior medical records, based on reasonable medical probability, it is not medically probable that the right ankle sprain is causally related to the March 15, 2014 reported event.

28. Dr. Paz further concluded that Claimant's right knee symptoms were not causally related to the March 15, 2014 incident, based on reasonable medical probability.

29. Dr. Paz explained that "considering the direct history provided by [Claimant], the history documented in the medical record, and the documentation available from the office of Dr. Melendez, if she did sustain a right ankle injury on or about March 15, 2014, the injury did not require medical treatment at that time. The right ankle and right knee symptoms which are referenced in Dr. Melendez's September 24, 2014 report are inconsistent with an injury sustained on or about March 15, 2014."

30. Dr. Paz testified that his medical conclusions were to a reasonable degree of medical certainty.

31. Dr. Paz testified that at the IME Claimant could not stand due to right knee pain.

32. Dr. Paz did not review Claimant's actual MRI images, just the MRI reports.

33. Dr. Paz did not have Claimant's medical records from Dr. Melendez when he conducted the IME. Rather, he used the history Claimant told him about her appointments with Dr. Melendez.

34. Dr. Paz did not have an MRI report of Claimant's right knee when he wrote his IME.

35. Throughout the majority of Claimant's medical appointments, beginning with Dr. Melendez and including her Concentra appointments, specialist appointments, and the IME, Claimant consistently reported a high level of pain in her right knee and/or right ankle. At times she used a crutch and was unable to walk without the crutch due to the high level of pain.

36. Although the medical records seem to indicate that Claimant does not have a fracture of her right ankle, Dr. Melendez and other physicians indicated in the medical records that she had a sprain of her right ankle.

37. Claimant's testimony at hearing was credible and persuasive.

38. Dr. Burris's medical report was not credible or persuasive.

39. Dr. Paz's report and testimony were not credible or pursausive.

CONCLUSIONS OF LAW

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

2. For a claim to be compensable under the Act, a claimant has the burden of proving by a preponderance of the evidence that he or 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).

3. 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. *Id.*

4. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

5. The ALJ is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). Finally, the ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See, e.g.* § 8-43-210, C.R.S.; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

6. An 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).

7. An injury occurs "in the course of" employment when the employee demonstrates that the injury occurred within the time and place of his or her employment and during an activity that had some connection with his or her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

8. The "arising out of" element is narrower than the course of employment element, and requires a claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *Triad*; *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). It is generally 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). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the

circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996).

9. Claimant has proven by a preponderance of the evidence that her right knee and ankle injuries occurred in the course of her employment with Employer. She credibly testified that she was working for Employer at Target on March 15, 2014 when she twisted her right ankle and felt pain in her right knee. Claimant's injury occurred during an activity that had some connection with her work-related functions: operating the scrubber machine to wash Target's floors. Claimant is a janitorial worker, and operating a scrubber to clean floors is certainly part of her work-related functions. Therefore, Claimant has proven by a preponderance of the evidence that her right knee and ankle injuries occurred in the course of her employment with Employer.

10. Claimant has likewise proven by a preponderance of the evidence that her right knee and ankle injuries arose out of her employment with Employer. Dr. Burris and Dr. Paz based their conclusions that Claimant's injuries were not related to the March 15, 2014 incident in part on the fact that she waited so long to report the injury. However, Claimant credibly testified that the reason she did not report her injury was because she was fearful of losing her job, and she was fearful her family members would lose their jobs. Mr. Ariza credibly testified that Employer had treated her well, the implication being that Employer had never given Claimant any reason to fear losing her job. The ALJ concludes, however, that the reason Claimant was fearful was not necessarily because of anything Employer had done or said, but because of Claimant's undocumented status. Mr. Ariza's own testimony supports that conclusion, when he stated that if he discovered one of his employees was undocumented, he would have to report that fact to Employer. Claimant's fears were not unreasonable given Mr. Ariza's testimony. Her reasons for waiting six months to report the injury are credible, and therefore the ALJ concludes that Claimant's delay in reporting her injury is not persuasive evidence of anything other than her fear of her legal status becoming public knowledge. The delay is not persuasive evidence that Claimant's injury is not related to the March 15, 2014 incident.

11. Furthermore, the ALJ does not find Dr. Paz's opinion that "if she did sustain a right ankle injury on or about March 15, 2014, the injury did not require medical treatment at that time" persuasive evidence that Claimant's injuries did not arise out of her employment with Employer. Since Claimant did not seek medical treatment until August 15, 2014, there are no medical records at or near the time of March 15, 2014. Thus, it is unclear how Dr. Paz could conclude the injury did not require medical treatment at that time since no records exist indicating anything whatsoever, either in Claimant's favor or in Respondents' favor.

12. Similarly, the ALJ does not find Dr. Burris' conclusions persuasive. He remarks that it is difficult for him to relate Claimant's complaints with "the reportedly

minor event that occurred 10 months ago." Again, no medical records exist near the time of Claimant's accident. Also, it is unlikely Claimant reported to Dr. Burris that the event was minor, given her consistent reports of high pain levels. Additionally, Dr. Burris wrote that Claimant told him she hurt herself by striking her right foot against an adjacent machine. Claimant was entirely consistent in telling every other physician how she hurt herself, and never once stated she hurt herself by striking an adjacent machine. The ALJ found Claimant credible at hearing, and therefore finds it unlikely that Claimant told Dr. Burris she struck her foot on an adjacent machine. Because of these problems with Dr. Burris's report, the ALJ does not find his conclusions persuasive that Claimant's injuries were not causally related to the March 15, 2014 incident.

13. Finally, the medical evidence supports the fact that Claimant had injuries in her right knee and right ankle that arose out of her employment with Employer. The MRI from September 8, 2014, indicated that Claimant had an "incomplete vertical tear in the anterior horn and body segment junction of medial meniscus." The second MRI from December 19, 2014 confirmed that "a chronic complete tear of the anterior talofibular ligament is present." The medical records indicated she also had a right ankle sprain. That the injuries arose out of the incident that occurred on March 15, 2014 is supported by the fact that Claimant consistently related to multiple physicians that she twisted her right ankle and felt pain in her right knee when she slipped off the scrubber. On September 25, 2014, Dr. Melendez reports that Claimant told her "she sustained an injury to her right foot/knee after stepping down from a rider scrubber while at work. Patient reports that since that date of her injury, she has been experiencing increased knee/ankle pain and difficulty walking as well." On October 1, 2014, Claimant told a Concentra physician that "she stepped down off of riding waxing machine onto squeegee and twisted right ankle and right knee." On October 7, 2014, she told another Concentra physician "Pt reports that she was using a scooter at work. While getting off of it, her right foot twisted and she fell to the ground." Dr. Paz wrote "on March 15, 2014 she was operating a floor cleaning machine called a green machine. To operate it she had to sit on it and drive it. As she was stepping off of it she slipped and fell to the floor." Her husband credibly testified that he heard Claimant yell and helped her off of the floor after she fell. Claimant twisted her right ankle and felt pain in her right knee on March 15, 2014 while at work. As detailed above, she suffered right knee and ankle injuries as confirmed by MRI reports and multiple physicians. Based on all of the above, the ALJ concludes that Claimant has met her burden of proof that her right knee and ankle injuries arouse of out her employment with Employer and are therefore compensable.

ORDER

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee and ankle on March 15, 2014.

2. Claimant is entitled to reasonable and necessary medical treatment.

DATED: October 22, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on 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(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 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 Dr. Hehman is authorized to treat claimant for his injuries?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant testified he began working for Employer in May 2008. Claimant testified that employer is a commercial construction business that at times specializes in building hydroelectric plants. Claimant testified that he has been employed as a foreman since 2012, when he moved from Washington to Colorado to work on hydroelectric plants.

2. Claimant testified that he had a work injury to his neck that occurred on January 31, 2011 with employer. Claimant testified he was pulling apart sheets of metal decking material that were frozen together and felt a pop in his neck. Claimant eventually underwent a C3-C4 diskectomy and fusion surgery performed by Dr. Atteberry on February 15, 2012. Claimant testified that after surgery, he worked as a welding instructor for a short time, because the work was not as physical as his work with employer. Claimant was released to full work duty and provided a permanent impairment rating by his treating physician in Washington on April 26, 2012. Claimant testified he returned to work for employer in his normal job without restrictions following the January 31, 2011 work injury.

3. Claimant testified that approximately six months after being released to full work duty, he returned to work for employer. Claimant testified that initially he worked for employer in Washington, before being transferred to Colorado to work as a foreman on hydroelectric projects in the Montrose area.

4. Claimant testified that he had some continuing neck pain in late 2012 and early 2013 when he returned to physical labor for Employer. Claimant testified that he wondered if the fusion had failed due to that physical labor. Claimant testified that he requested to reopen his Washington workers' compensation claim on that basis. He testified that he appealed a denial of reopening in February 2013 because he still believed that the fusion had potentially failed. He testified that the claim did not reopen.

5. Claimant testified that he underwent a computed tomography ("CT") scan of his neck in August 2013 at his own expense. Claimant testified that after his attempt to reopen his January 2011 claim was denied, he was still having some aches and pains in his neck, and he wanted to ensure that the fusion had not failed.

6. The medical records indicate that claimant's surgeon, Dr. Atteberry, recommended that claimant obtain a primary doctor in Colorado so that he could have traction treatment, prescription medication, or potentially physical therapy. Claimant testified that he did not get any of these treatments or obtain a primary physician prior to September 2014. Claimant testified that, at the time, he believed his neck pain was something he would either "live with" or that it would go away. He testified that his neck pain went away eventually. He testified that he did not pursue any other care in early 2013 because his symptoms eventually went away in 2013. He testified that the reason there were no medical records discussing his neck between August 2013 and September 2014 was that he did not have any ongoing serious problems in his neck.

7. Claimant testified about a December 11, 2013 medical record from Montrose Memorial Hospital. Claimant testified that he sought medical care for chest pain after he was wrestling around with his co-worker but that he did not seek care for neck symptoms because he was not having them. Medical providers at Montrose Memorial Hospital noted that claimant has had chronic neck pain and chronic left fifth finger numbness. The medical records from Memorial Hospital also noted that claimant had a normal inspection of the neck.

8. Claimant testified that he did not have any neck problems either at work or outside of work after the August 2, 2013 CT scan up until September 2014. Claimant denied having symptoms in his left hand or left arm between June 2013 and September 2014.

9. Claimant testified that on September 23, 2014, he woke up without any particular neck symptoms. Claimant testified that he went to work, and that morning was shaping metal penstock with a 16-foot-tall bottle jack along with a coworker who was welding. Claimant testified that that as he was lifting the bottle jack to his coworker above him, he began having increased neck pain. Claimant testified that he was later stripping plywood forms off of concrete and his neck pain worsened. Claimant testified that after stripping the concrete forms, he had difficulty moving his neck. Claimant testified that these symptoms worsened over the course of the day. Claimant testified that he could not identify a particular jolt of pain with a particular activity, but that his symptoms developed over the course of the workday. The ALJ finds claimant's testimony in this regard to be credible.

10. Claimant testified that he reported his neck pain that day to his supervisor, Mr. Ben Sartain. Claimant testified that Mr. Ben Sartain recommended that claimant go home for the day. Claimant testified he told Mr. Ben Sartain that he felt well enough to continue working.

11. Mr. Sartain authored a Supervisor's Report of Accident/Injury on September 23, 2014. Mr. Sartain noted that claimant was "stripping the deep intake walls" at the time of the accident. The Supervisor's Report of Acciden/Injury noes that claimant "does not [know] when it happen[ed]. He said his neck was find in the morning and does not know what he did." Mr. Sartain also noted: "He was stripping the intake walls and hurt his neck. He does not know when or how he did it. He just came to me and said his neck was all jacked up, but he was fine to keep working." With regard to witnesses, Mr. Sartain noted that "nobody knows when he did hurt his neck." With regard to how the accident could have been prevented, Mr. Sartain noted it was an "old injury."

12. Claimant testified that Mr. Ben Sartain was on the job with him when the January 31, 2011 work injury took place. Claimant testified that he talked about his neck injury with Mr. Ben Sartain, including the August 2013 CT scan, and that he told Mr. Ben Sartain about his prior neck problems after the September 23, 2014 injury happened. Claimant testified that he believed Mr. Ben Sartain filled out the report with a reference to an prior workers' compensation claim because Mr. Ben Sartain assumed that claimant's injury on September 23, 2014 was related to the old injury.

13. Claimant also filled out an Employee Report of Accident/Incident on September 24, 2014. Claimant noted that he was "stripping deep intake" when the injury occurred. Claimant noted that he had injured his neck, and the description of the injury was "neck pain." Claimant also indicated that he had injured his neck before, and had seen a doctor about that injury, and that information about how that injury occurred "should be on file at the office." Claimant testified that he answered questions about seeing a doctor and how the injury occurred the way he did because he had the mistaken belief that those questions referred to his prior injury in 2011.

14. Claimant testified that he went to Montrose Memorial Hospital on September 23, 2014 due to severe neck pain. Claimant testified that Mr. Ben Sartain knew he was seeking care at Montrose Memorial Hospital, and that Mr. Ben Sartain came to his home to watch his children so that claimant and his wife could go to the emergency room. Claimant testified that he was not advised by Mr. Ben Sartain, or anyone else at employer, to go to a specific doctor.

15. The hospital record noted that Insurer was the insurance company to be billed. Dr. Borgo evaluated claimant in the emergency department. Dr. Borgo noted that claimant had severe neck pain that began gradually that day while he was at work. Dr. Borgo referred claimant to Dr. Faragher and to Dr. Tice.

16. Dr. Borgo noted that claimant denied an injury. Claimant testified that he may have stated he didn't have an injury, because he did not have a broken leg, or a

cut, or any specific incident. Claimant testified that he had an increase in neck pain with work activity as he described, but that he did not associate his neck pain with a specific incident while working on September 23, 2014.

17. Claimant saw Dr. Tice on October 13, 2014. Dr. Tice summarized claimant's history, including the history of his prior work injury in Washington. Dr. Tice noted that on or about September 23, 2014 claimant was doing his usual job and began having recurrent symptoms of neck and left arm pain, similar to what he had previously but more intense. Dr. Tice noted that claimant had been able to continue to work, but he was much worse in the morning with severe pain. Dr. Tice also noted that claimant had numbness in his left small finger and had some weakness in his hand. Dr. Tice noted that claimant had cervical radiculopathy with findings of ulnar neuropathy. Dr. Tice recommended an MRI scan and x-rays of the neck with flexion and extension. Dr. Tice also referred claimant to Dr. Hehmann.

18. Claimant testified that he eventually learned he had to see a doctor pre-authorized by Respondents. Claimant testified that neither himself nor Mr. Ben Sartain knew that claimant needed to see a doctor from a list of pre-approved doctors.

19. Claimant first saw Dr. Frazzetta on October 30, 2014 after being referred by Insurer. Dr. Frazzetta noted that on September 23, 2014, claimant was performing his regular job, helping to lift a jack when he noticed some acute neck pain in the lower part of the cervical spine. The doctor noted that as the day progressed, claimant's pain became worse, and became severe enough that claimant went to the emergency room that day. Dr. Frazzetta noted that claimant saw Dr. Tice who recommended an MRI and x-rays, but that claimant had not yet seen a primary physician. Dr. Frazzetta noted that claimant had left lower neck pain, upper shoulder pain, some chest pain, numbness in his left little finger, and numbness in the left elbow. Dr. Frazzetta noted that claimant had been working his regular job as a foreman, being careful to not "overdo things." Dr. Frazzetta recommended a magnetic resonance image ("MRI").

20. Claimant had an MRI performed on his neck on October 30, 2014. The MRI showed mild flattening of the thecal sac at the C3-C4 level, disc dehydration and modest central bulge without impingement at the C5-C6 level, and a left eccentric bulge with mild flattening of the thecal sac without neural impingement.

21. Claimant returned to see Dr. Frazzetta on January 13, 2015. Dr. Frazzetta noted claimant had ongoing neck pain, and that his worker's compensation claim had been denied. Dr. Frazetta reviewed claimant's MRI, and referred claimant to Dr. Tice.

22. Claimant returned to see Dr. Tice on February 24, 2015. Dr. Tice noted that claimant continued to have neck and upper extremity symptoms, but that his worker's compensation claim had been denied. Dr. Tice noted that claimant might be a candidate for surgery or epidural injections due to his ongoing symptoms. Dr. Tice also noted: "I do think with reasonable medical certainty that the patient was doing well until

he had his injury in September, which was a new injury on his superimposed problem of previous cervical spine problem."

23. Claimant returned to see Dr. Frazzetta on April 20, 2015. Dr. Frazzetta noted that claimant still had ongoing pain from his September 23, 2014 injury. Dr. Frazzetta noted that claimant should follow-up with Dr. Tice and Dr. Hehmann. Dr. Frazzetta noted that claimant was waiting to have electromyelogram ("EMG") studies done with Dr. Hehmann.

24. Claimant testified that he had seen Dr. Hehmann once, but that Dr. Hehmann had recommended a nerve conduction test that had not yet taken place. Claimant testified the test had not taken place because his claim had been denied.

25. Claimant testified that after the injury he spoke with Ms. Mertz, claims representative for Insurer, and told her that he had had a prior slight cervical spine bulge, which had "finally [given] out." Claimant testified that he told Ms. Mertz that at times prior to the September 23, 2014 injury he would have some soreness in the mornings, but that the soreness was nothing like he had after the September 23, 2014 injury.

26. Claimant testified at hearing that he continued to have constant, sharp pain in his neck. Claimant testified that his pain radiated to his left shoulder blade, and into his left upper chest. Claimant testified that he had an achy sensation in his left elbow, constant numbness in his left pinky finger, and occasional left hand numbness. He testified that if he stayed in the same position for a prolonged period of time, he could have some numbness in his right hand. Claimant testified that he did not have those symptoms the day before his September 23, 2014 injury. Claimant testified that he had not had a symptom-free day since September 23, 2014. The ALJ finds claimant's testimony regarding his symptoms after September 23, 2014 to be credible.

27. When asked to compare his neck symptoms in August 2013 when he had the CT scan, and after the September 23, 2014 injury, claimant testified that he had only aches and pains in his neck in August 2013, and that his symptoms after September 23, 2014 were much worse than those in August 2013.

28. Mr. Rick Sartain, Operations Manager of employer, testified at hearing on behalf of claimant. Mr. Rick Sartain testified by phone from employer's location in Sunnyside, Washington. Mr. Rick Sartain testified he had known claimant since he was hired by employer in 2008, and knew that claimant was a reliable and trusted employee. Mr. Rick Sartain testified that he was testifying in court in order to clear up confusion that he believed had led respondents to deny claimant's worker's compensation claim.

29. Mr. Rick Sartain testified that claimant had a prior workers' compensation injury to his neck in the state of Washington in 2011. Mr. Rick Sartain was aware that claimant had a surgery to repair his neck, and that he had at least a partial recovery following that surgery.

30. Mr. Rick Sartain testified that he was aware that claimant attempted to reopen his Washington workers' compensation case in 2012 and 2013. Mr. Rick Sartain testified he did not know many details of the reopening attempt, because in Washington claimants attempting to reopen their cases deal directly with the state without much input from the employer.

31. Mr. Rick Sartain testified that claimant returned to work with employer after a brief absence when he worked elsewhere. Mr. Rick Sartain testified that claimant returned to work for Employer with "no problems" with his neck, and testified specifically that claimant had "no limitations" when he returned to work. Mr. Rick Sartain testified that claimant worked a lighter duty job so that he would not be in a compromising spot after his initial neck injury. Mr. Rick Sartain testified that claimant was able to perform his job duties without any problems. Mr. Rick Sartain testified that he did not have any conversations with claimant regarding any neck symptoms leading up to September 23, 2014.

32. Mr. Rick Sartain testified he became aware that claimant reported a work injury when he received word that Ben Sartain, claimant's supervisor, reported that claimant had injured his neck. Mr. Rick Sartain testified that he was aware that claimant had been working in an intake shaft with penstock, and potentially had been "looking up all the time" when he hurt his neck. Mr. Rick Sartain testified that his understanding was that the September 23, 2014 neck injury was "unrelated" to the prior neck injury that occurred in Washington.

33. When asked about the Supervisor's Report of Accident/Injury filled out by Mr. Ben Sartain, and specifically the reference to an "old injury," Mr. Rick Sartain testified that there was "rustration that the report did not have as much detail as he would have liked. Mr. Rick Sartain testified that Ben Sartain was fully aware that claimant had a 2011 neck injury, and testified that Ben Sartain was probably making the assumption that the new incident was related to the 2011 claim.

34. Mr. Rick Sartain testified that he saw claimant a week prior to September 23, 2014 and a week after September 23, 2014. Mr. Rick Sartain testified that claimant looked much worse a week after September 23 than he did a week prior.

35. When Mr. Rick Sartain was asked whether claimant's report of an incident on September 23, 2014 was a work injury, Mr. Rick Sartain testified that he was relatively sure something happened to claimant's neck on September 23, 2014.

36. Mr. Mark Wyatt, the Safety Director of employer, testified at hearing in this matter. Mr. Wyatt also testified by phone from Employer's location in Washington. Mr. Wyatt testified that he knew about claimant's September 23, 2014 claim because he received a phone call from Ben Sartain that indicated that claimant had hurt his neck and sought medical care at Montrose Memorial Hospital. Mr. Wyatt testified that he filled out Employer's First Report of Injury, dated September 24, 2014. The First Report noted no specific incident or event and that claimant had neck pain that developed during the day with the claimant eventually seeking medical treatment after work at

Montrose Memorial Hospital. Mr. Wyatt testified he filled the First Report out in that manner based on written statements of Ben Sartain and claimant.

37. Respondents obtained an independent medical examination ("IME") of claimant with Dr. John McBride on June 2, 2015. Dr. McBride reviewed claimant's medical records, obtained a history from the claimant and performed a physical examination. Dr. McBride also produced reports on June 27, July 6, and August 1, 2015 after reviewing additional medical records. Dr. McBride opined that claimant's neck pain and left upper extremity neuropathy never resolved after the 2011 work injury, and that claimant's current neck and left upper extremity complaints were not related to the September 23, 2014 event. Dr. McBride opined that there was no acute injury on September 23, 2014. Dr. McBride based his opinion, in part, on his contention that claimant's complaints when he requested to reopen his worker's compensation injury [in 2013 were the same as his present complaints. Dr. McBride did indicate that claimant had an aggravation of his previous work injury, but opined that claimant did not have a new injury.

38. Dr. McBride testified at deposition on September 17, 2015. His testimony was consistent with his reports.

39. Dr. McBride testified that claimant's symptoms became progressively worse after the February 15, 2012 neck surgery. Dr. McBride testified that between Dr. Atteberry's May 29, 2013 report, and the Montrose Memorial Hospital record dated September 23, 2014, the date of the new injury, the only medical treatment claimant sought was the CT scan on August 2, 2013. Dr. McBride testified there were not any medical records between August 2, 2013 and September 23, 2014 indicating claimant sought medical care for neck problems. Dr. McBride testified that, per claimant's report, he did not have any neck symptoms in 2014 whatsoever up until the September 23, 2014 injury. Dr. McBride also testified that claimant reported to him that he did not have any neck problems in the year prior to September 23, 2014, did not miss any work in 2014 due to neck problems, and did not identify any incidents in 2013 or 2014 that led to an increase in neck pain. Dr. McBride testified that 99% of the time, physicians give their patients the benefit of the doubt when they describe their symptoms.

40. Dr. McBride testified that patients who are asymptomatic may have MRI findings in their spine, and that patients who are symptomatic may have MRI findings in their spine. Dr. McBride testified that the difference between patients who are asymptomatic and patients who are symptomatic is a product of pain level and function. Dr. McBride testified that pathology in the spine that is apparent on MRI, but not causing symptoms, can be made symptomatic with trauma.

41. Dr. McBride also testified that he did not believe claimant's injury to be work-related because the findings seen on the October 30, 2014 MRI scan (after the September 23, 2014 date of injury) were signs of "ongoing degeneration from his previous injury." Dr. McBride testified that he would expect claimant to have had neck symptoms over 2013 and 2014 prior to the most recent event, but that he would have to rely on the records for information about claimant's condition. Dr. McBride agreed that

in a medical record dated December 11, 2013, medical providers noted that claimant had a "normal inspection" of his neck, which meant that claimant did not have loss of range of motion or tenderness of the neck, and that claimant was not complaining of neck pain. Dr. McBride testified that claimant's reports of his neck pain going away prior to 2014 were not as accurate as the medical records.

42. Dr. McBride testified that claimant had an onset of his neck pain on September 23, 2014. Dr. McBride admitted in his testimony that the symptoms claimant complained of following September 23, 2014 probably required medical care. Dr. McBride testified that if claimant did not have a new onset of symptoms on September 23, 2014, he would not have required medical care.

43. Claimant testified that he disagreed with Dr. McBride's opinions that he did not sustain a new injury on September 23, 2014, the symptoms he had after September 23, 2014 were all related to the 2011 work injury, and that his neck pain never resolved after the 2011 work injury and had not changed since the 2011 work injury. Claimant testified that he disagreed because his symptoms following the 2011 work injury in fact did resolve, and that he remained asymptomatic until the September 23, 2014 injury.

44. The ALJ finds that claimant has proven that it is more likely than not that he sustained a compensable injury to his neck on September 23, 2014. The ALJ notes that even Dr. McBride's testimony establishes that claimant's neck symptoms were aggravated and required treatment as the result of the work injury on September 23, 2014. On the issue of compensability, the ALJ finds that claimant has established that it is more probable than not that claimant sustained an injury on September 23, 2014 arising out of and in the course of his employment with employer that required medical treatment to cure and relieve the claimant from the effects of the injury.

45. In this regard, the ALJ credits the medical opinions expressed by physicians and providers at Montrose Memorial Hospital, Dr. Tice, and Dr. Frazzetta in the medical records over the contrary opinions expressed by Dr. McBride in his IME report and testimony, and finds that claimant has proven that it is more likely than not that he suffered a compensable injury arising out of and in the course of his employment with Employer. 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 neck when he lifted a bottle jack and stripped concrete forms while working on September 23, 2014. The ALJ further credits claimant's testimony that although he had a prior neck injury that involved upper extremity radiculopathy, claimant was not experiencing neck or upper extremity symptoms and he did not require medical treatment before the September 23, 2014 injury occurred. The ALJ credits claimant's testimony and finds that claimant has proven that it is more likely than not that his neck and upper extremity symptoms began when his asymptomatic preexisting neck condition was aggravated or exacerbated when he lifted a bottle jack and stripped concrete forms while working on September 23, 2014.

46. The ALJ notes that Rick Sartain's testimony supports claimant's testimony that he was not experiencing neck or upper extremity symptoms before the September 23, 2014 injury. The ALJ credits Rick Sartain's testimony that claimant seemed to be symptom-free in the weeks prior to the September 23, 2014 injury, but had worsened the week after the date of injury. The ALJ credits Rick Sartain's testimony that claimant sustained a new injury on September 23, 2014.

47. 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 Montrose Memorial Hospital on September 23, 2014 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 Montrose Memorial Hospital on September 23, 2014 on an emergent basis for his neck pain. The ALJ also notes that claimant sought care with the tacit approval of Employer, because claimant's supervisor Ben Sartain knew claimant was seeking medical care, and helped watch claimant's children to allow claimant to seek medical care on September 23, 2014.

48. The ALJ further finds that the medical care provided by Dr. Tice on October 13, 2014 was authorized care, and was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury. The ALJ credits claimant's testimony that neither he nor his supervisor Ben Sartain knew that claimant needed to see a specific pre-authorized medical provider. The ALJ finds that claimant was not advised by his Employer to see a specific, pre-authorized medical provider, and was therefore entitled to choose his own physician. Moreover, the ALJ finds that Dr. Borgo referred claimant in writing to Dr. Tice on September 23, 2014.

49. The ALJ notes that claimant argues that Dr. Tice became an authorized treating physician by virtue of a written referral from Dr. Frazzetta on January 13, 2015. However, because Dr. Tice was already authorized, the referral from Dr. Frazzetta does not "reauthorize" Dr. Tice. The ALJ also finds that Dr. Hehmann is an authorized treating provider by virtue of written referrals from Dr. Frazzetta and Dr. Tice, both authorized treating physicians. The ALJ further finds that the EMG study proposed by Drs. Frazzetta, Tice, and Hehmann is reasonable medical care reasonable and necessary to cure and relieve claimant from the effects of the industrial injury.

50. The ALJ finds that Respondents are liable for the medical treatment provided by Montrose Memorial Hospital (Dr. Borgo), Dr. Tice, Dr. Farragher, and Dr. Hehmann pursuant to the Colorado Medical Fee Schedule set forth by the Division of Workers' Compensation.

51. Wage records entered into evidence establish that claimant earned $53,218.25 in the 52 weeks prior to this injury (time period of September 23, 2013 through September 21, 2014). The ALJ credits the wage records and finds that claimant has established that it is more likely than not that his AWW should properly be established as $1,023.43.

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 injured his neck on September 23, 2014.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, respondents did not designate a physician to treat claimant for his work injuries and claimant chose to treat with Dr. Borgo. Because respondents did not designate a physician, the choice of physician fell to claimant. As found, Dr. Borgo referred claimant to Dr. Faragher and Dr. Tice. Dr. Tice eventually referred claimant to Dr. Hehmann.

8. As found, respondents eventually designated Dr. Frazzetta who initially evaluated claimant on October 30, 2014, but that does not negate the fact that the treatment with Dr. Tice, Dr. Faragher and Dr. Hehmann was already authorized.

9. As found, the treatment provided by Dr. Tice, Dr. Faragher, Dr. Hehmann, Dr. Frazzetta and Dr. Borgo are found to be reasonable necessary and related to claimant's injury. Additionally, Dr. Hehmann, Dr. Tice and Dr. Frazzetta are all found to be within the proper chain of referrals and are thereby authorized to treat claimant for his work injury.

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 earned $53,218.25 in the 52 weeks prior to his compensable work injury. As found, claimant's AWW is determined to be $1,023.43.

ORDER

It is therefore ordered that:

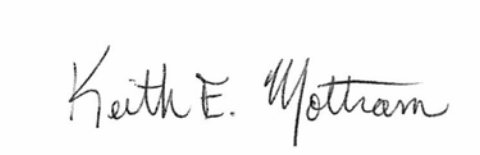
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of the September 23, 2014 work injury from physicians authorized to treat claimant for his injury, including but not limited to Dr. Hehmann, Dr. Tice, Dr. Faragher, and Dr. Frazzetta.

2. Claimant's AWW for his September 23, 2014 work injury is $1,023.43.

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: October 27, 2015



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

STIPULATION

1. The parties stipulated that, should the claim be found compensable and the Claimant proves he is entitled to temporary disability benefits, the Claimant is a maximum wage earner and his wage is the maximum amount for his date of injury of October 17, 2014 which corresponds to a TTD rate of $881.65 per week.

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 on October 17, 2014.

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

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to 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 in this claim.

FINDINGS OF FACT

1. The Claimant has been employed in the produce department for Employer for approximately seven years. His job duties include selecting produce (Hrg. Tr., p. 7). The Claimant works at the distribution center. He wears an ear piece through which he receives orders for produce and he has to lift them from the floor up. The weight of the containers of produce varies from 10 lbs. to 50 lbs and in between (Hrg. Tr., p. 21). The Claimant has two 15 minute breaks and a 30 minute break during his shift (Hrg. Tr., p. 22). The Claimant testified that he was injured on October 17, 2014 while lifting a box of broccoli. His back immediately hurt a lot and he was not able to stand up straight (Hrg. Tr., p. 12).

2. The Claimant testified that he reported the October 17, 2014 incident to his supervisor "Brock" and to Rich Powelsick (Hrg. Tr., p. 12). The Claimant testified that neither of them sent him for medical care (Hrg. Tr., pp. 12-13). Mr. Powelsick told the Claimant that he could go home and rest. The Claimant did not return to work until

three months later. He wasn't feeling good when he returned to work and he testified that he still does not feel good (Hrg. Tr., p. 13). The Claimant testified that he saw his personal physician at Kaiser Permanente and received work restrictions limiting him to 10 lbs. of lifting. His employer did not offer a modified job that limited his lifting to 10lbs., so, a couple days after returning to work, he stopped working again and stayed home after about February 3, 2015 (Hrg. Tr., p. 14). The Claimant testified that he thinks he returned to work again on March 13, 2015 and his job requirements are that he must complete 100% of his job, but he states that he can't do it (Hrg. Tr., p. 15). While the Claimant's statement about a 100% completion requirement for his production target would seem to be hyperbole, the Employer's records fully support the Claimant's testimony, as reflected in Respondent's Exhibit H wherein the Claimant has received reprimands and warnings for miniscule offenses, including, a failure to meet his production goal by 0.52% or clocking in approximately 1 minute before the scheduled time (see references to Employer records below).

3. On October 21, 2014, the Claimant saw Dr. Angie Martinez at Kaiser Permanente and was diagnosed with "acute back pain due to muscle spasm." Dr. Martinez advised the Claimant to discuss this case with his supervisor due to the onset of symptoms at work while lifting a crate of broccoli. Dr. Martinez recommended "better pain management for muscle support and physical therapy" (Claimant's Exhibit 3, p. 7).

4. On October 31, 2014, the Claimant saw Dr. Emily Merrick at Kaiser Permanente. The Claimant was referred to a massage therapist and for physical therapy (Claimant's Exhibit 5, p. 18). Dr. Merrick also provided the Claimant with a letter verifying that the Claimant was treated at Kaiser on October 31, 2014 and that the Claimant could return to work on November 3, 2014 with a 10 lb restriction for lifting, pushing and pulling (Claimant's Exhibit 5, p. 17; Respondent's Exhibit E, p. 17).

5. The Respondent filed a Notice of Contest on December 17, 2014 denying liability for the October 17, 2014 injury as not work-related (Respondent's Exhibit A, p. 1).

6. The Claimant testified that he has had prior injuries. In May, about five years ago he was in a car accident where he injured his neck. The Claimant testified that he fully recovered from this and was able to return to his employment and perform all of his job duties (Hrg. Tr., p. 15). He also testified that he injured himself while helping his brother lift a refrigerator at home in May of 2014 (Hrg. Tr., p. 16). He testified that he last saw a doctor for that injury in July of 2014 and he returned to work full duty after this (Hrg. Tr., p. 17 and pp. 27-28).

7. Employer records show the Claimant was absent from work from August 25, 2011 through September 7, 2011 and returned to work on September 8, 2011. The Warehouse Manager noted the Claimant was unable to work his scheduled shifts during that time period due to a car accident (Respondent's Exhibit H; pp. 25-27).

8. On September 2, 2011, the Claimant provided a doctor note from Aim High Chiropractic stating that the Claimant was receiving care from the chiropractor for neck pain and low back pain due to a motor vehicle accident. The note provided the Claimant could return to work as of September 4, 2011 but the Claimant was to limit lifting to no more than 50 lbs. and work at a slow pace (Respondent's Exhibit Hi, p. 24).

9. The medical records document that the Claimant received medical treatment for a back strain and muscle spasm for a work incident on July 17, 2013. He was initially evaluated by Dr. Marc Steinmetz on July 22, 2013 and the Claimant reported he was injured when lifting a 40-50 lb. object the previous Friday. He tried ice, rest and Advil but the pain persisted. The Claimant did not have any leg complaints. Dr. Steinmetz placed the Claimant on light duty with a 10 lb. lifting restriction and gave him a back support and cold pack (Claimant's Exhibit 4, pp. 14-16). The Claimant last saw a doctor for this injury on July 29, 2013 when he saw Dr. Steinmetz again at Midtown Occupational Health. Dr. Steinmetz found the Claimant at MMI on that date as the Claimant reported he had no pain or stiffness and was all better and did not need any medications. Dr. Steinmetz returned the Claimant to work full duty, with no restrictions, impairment, follow up or maintenance treatment (Claimant's Exhibit 4, pp. 11-13).

10. On May 27, 2014, the Claimant was seen at Kaiser Permanente by Nurse Practitioner Karen Stockman for a lumbar muscle strain. He was given medication for muscle spasm and ibuprofen for pain and inflammation. The medical record notes that the Claimant had "intermittent back pain" for the past two weeks in the center of his low back and in his buttocks. The Claimant reported that at times he cannot straighten up. NP Stockman noted that the Claimant works as a produce selector and he lifts 60 lb boxes (Respondent's Exhibit G, pp. 11-12).

11. Employer records show the Claimant was absent from work from July 14, 2014 until July 21, 2014. There are no additional notes on the form indicating the reason for the absence (Respondent's Exhibit H, pp. 30-31).

12. On July 14, 2014, the Claimant saw Nurse Practitioner Debra Brew for left foot pain and continued low back pain. The Claimant reported that he was seen in May for the low back pain and he received a prescription for Robaxin and Ibuprofen which helped. The Claimant told NP Brew that his pain started when he moved a refrigerator in May. He also told her that is started having numbness in his left shoulder and arm the day before this visit. The Claimant was requesting a note for work because his job requires lifting 50 lb. boxes. Based on a relatively normal physical examination, NP Brew determined that a lumbar spine x-ray was not indicated. The Claimant was advised to rest and apply alternating cold and heat and to take medications for pain and to relax his muscles. A longer term plan of a home back care exercise program and proper lifting techniques was discussed. It was noted that physical therapy and x-ray studies would be considered if the Claimant was not improving. The Claimant received a note for work (Respondent's Exhibit E, pp. 15-16).

A note was provided that stated the Claimant received treatment on July 14, 2014 and could resume work with no restrictions on July 22, 2014 (Claimant's Exhibit 9, p. 19).

13. Employer records document that on August 15, 2014, the Claimant received a daily production reprimand for unsatisfactory production. It was noted that his daily production was 91.48% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 37).

14. Employer records document that on August 24, 2014, the Claimant received a daily production reprimand for unsatisfactory production. It was noted that his daily production was 89.59% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 35). He also received a verbal warning for clocking in at 14.98 instead of 15.00 and was told that there are no exceptions for punching in prior to 15.00 (Respondent's Exhibit H, p. 36).

15. Employer records document that on August 31, 2014, the Claimant received a record of verbal reprimand for low production. It was noted that on the week ending August 30, 2014, the Claimant failed to achieve his minimum production of 100%, achieving an average of 89.56% which was found to be unacceptable and warranted a verbal warning-level one (Respondent's Exhibit H, p. 34).

16. There are no records in evidence after August 31, 2014 through October 17, 2014 reprimanding the Claimant for failure to achieve daily production requirements or his 100% weekly minimum production requirement. As the Employer clearly issues reprimands to the Claimant for even the most miniscule deviations from the production requirement (e.g. the 0.52% shortage for his August 15, 2014 daily requirement), the ALJ infers that the Claimant did, in fact, meet 100% of his production goals in the period from August 31, 2014 through October 17, 2014 and was able to perform all of the functions of his job, as the Claimant testified. Thus, the Claimant was not symptomatic during this time period for his low back for any preexisting condition or prior injury to a level that had an impact on his ability to perform his job duties.

17. Employer records show the Claimant was absent from October 17, 2014 for 78 days and returned to work on January 9, 2015. It was noted by the supervisor that the leave was "FMLA." There is a supervisor comment on a second page stating "non occupational" (Respondent's Exhibit H, pp. 31-32).

18. Employer records are conflicting and confusing with respect to the Claimant's absenteeism. On January 16, 2015 a letter was provided to the Claimant noting that he was counseled on December 8, 2014 and December 21, 2014 for excessive absences, even though these were dates that the Claimant was off work on FMLA according to other records. The January 16, 2015 letter also indicates that the Claimant has 6 excused absences over the past 12 months. The Claimant was advised in writing that if he failed to substantially reduce his absentee rate within the next 30 days, his record would be reviewed again to determine if he should be continued to be employed by Employer (Respondent's Exhibit H, p. 41).

19. On February 1, 2015, the Claimant received a written warning that he signed off his last order at 23:18 and did not clock out until 23.30. He was reminded that Employer procedures require employees to clock out no longer than 5 minutes after he completed his last order (Respondent's Exhibit Hi, p. 44).

20. On February 25, 2015, the Claimant underwent an MRI of his lumbar spine. A slight dextro levo convexity curvature of the thoracolumbar spine was noted under vertebral alignment. Lumbar levels L1-2 through L4-5 were unremarkable and there was no significant neuroforaminal narrowing, spinal stenosis or discogenic degenerative changes noted. At L5-S-1 a small left paracentral disk protrusion with annular tear was noted. The protrusion abuts the descending left S1 nerve root without significant visualized mass effect. Minimal, left greater than right, bilateral inferior neural foraminal narrowing was noted with no spinal stenosis (Claimant's Exhibit 2, pp. 5-5; Respondent's Exhibit F, pp. 18-19).

21. Employer records document that on March 30, 2015, the Claimant received a daily production reprimand for unsatisfactory production. It was noted that his daily production was 87.20% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 45).

22. The Claimant testified that the pain he now has is different than the pain he had after the refrigerator incident. With the refrigerator it was only a feeling of muscles that were hurting and inflamed. Now, his back and buttocks hurt and he cannot stand or sit for too long and the pain travels part way down his right leg from the hip along the side of the leg (Hrg. Tr., pp. 17-18). The Claimant also testified that now he even feels the pain when he tries to lay down to sleep and the pain keeps him from sleeping (Hrg. Tr., p. 26).

23. On cross-examination, the Claimant testified that he was off work from October 17, 2014 until January 9, 2015 (Hrg. Tr., p. 19). The Claimant also testified that he was working full duty as of April 1, 2015 at the time of a medical examination with Dr. Mitchell (Hrg. Tr., pp. 20-21). After the appointment with Dr. Mitchell, the Claimant went off work again on FMLA (Hrg. Tr., p. 22).

24. During his cross-examination testimony, the Claimant was also presented with an incident report dated October 17, 2014 (Respondent's Exhibit H, p. 38) and he identified that the Employee Signature as his own (Hrg. Tr., p. 23). The Claimant testified that he disagrees with the description of the injury on the form which states "repeated motion" selecting produce caused a back strain. The Claimant testified that he only lifted or grabbed one box of broccoli and that is how he injured his back (Hrg. Tr., p. 23). The ALJ notes that, although the form states it is to be completed by the employee, the Claimant does not speak English. Additionally, the handwriting on the form (other than the signature of the Claimant) appears to match the handwriting of the supervisor Brad Davis and the ALJ finds that it is more likely than not that Mr. Davis (or

some person other than the Claimant) completed this form and the Claimant did not complete the form, but rather, he only provided the "Employee Signature" next to an "x" that was placed on the form. The form indicates that this incident report was "for information only" (Respondent's Exhibit H, p. 38). A second Employer form is also in the admitted exhibits and it provides that if an injury is "Information Only," the form is to be completed at the time of the injury report. The injury is again described as "repeated motion" and it is noted that the questions asking "What may have prevented this accident/injury or near miss?" was answered not applicable or "N/A." The ALJ finds that it is more likely than not that this form also was not completed by the Claimant, but instead by Mr. Davis (or some person other than the Claimant)(Respondent's Exhibit H, p. 39). The paperwork at pp. 38-39 of Respondent's Exhibit H nevertheless supports the Claimant's testimony that he had an injury and that he reported it to supervisors on October 17, 2014. It further supports his testimony that he was not provided with the information for obtaining any medical treatment for his back injury. With respect to the mechanism of injury, the Claimant's testimony that he injured himself lifting a single box of broccoli is found to be credible and persuasive and consistent with the Claimant's reporting of the injury to medical providers. It is found that the mechanism of the Claimant's injury was the lift of the box of broccoli described by the Claimant rather than a repetitive motion injury as noted on the Employer's forms.

25. The Claimant saw Dr. Linda Mitchell on April 1, 2015 for a Rule 8 independent medical examination (IME). Dr. Mitchell prepared a written report dated April 16, 2015 summarizing a medical record review, a physical examination, and an interview with the Claimant about the history of present illness/injury, current complaints, and past history (Respondent's Exhibit D). Dr. Mitchell noted that the Claimant reported that on October 17, 2014, he was picking up a box of broccoli and felt pain in the right low back. The Claimant reported this to his supervisor and did light duty work for the rest of the day. The Claimant reported that he went to see his primary care physician on the following Tuesday. The Claimant reported having 2 sessions of physical therapy and used ice and medications. The Claimant also reported undergoing MRIs in December 2014 and February 2015 (Respondent's Exhibit D, p. 7).

26. Medical records summarized by Dr. Mitchell in her IME report include prior complaints of low back problems. On June 29, 2013, the Claimant was seen at Midtown Occupational Health Services for back strain and spasm. He reported he was doing better with no pain or stiffness and no back tenderness, spasm or trigger points were noted. The Claimant reported he was ready to go back to work full duty and he had full lumbar range of motion. He was placed at MMI and released to full duty with no restrictions, impairment, follow up or maintenance treatment. On May 27, 2014, the Claimant was seen at Kaiser Permanent for "intermittent back pain for two weeks at the center of the mid low back to both buttocks." The Claimant reported he had been lifting 60 lb. boxes. He was assessed with lumbar strain and treated with medications. On July 17, 2014, the Claimant reported he still had low back pain due to moving a refrigerator in May. The Claimant complained of numbness in the left shoulder an arm.

He deferred physical therapy and instead discussed proper lifting technique and a home back exercise care program (Respondent's Exhibit D, p. 8).

27. The Claimant completed a pain diagram for Dr. Mitchell noting pain from the lower left scapula to the left buttock, although Dr. Mitchell noted that verbally, the Claimant stated it was on his right side. He reported a pain level of 10 and occasional numbness and tingling down the lateral aspect of the right leg down to the ankle. The Claimant complained of trouble sleeping that he cannot lift things overhead and a lack of strength in his back (Respondent's Exhibit D, p. 8). On physical examination, Dr. Mitchell noted that the Claimant's had scoliosis and there was a tightness in the right paraspinous lumbar musculature and the right lumbar to gluteal musculature (Respondent's Exhibit D, p. 9).

28. In response to specific interrogatories posed to Dr. Mitchell, she opined that the Claimant's low back pain and intermittent radicular symptoms date back to at least July 17, 2013. She further opined that the Claimant's low back pain is due to an underlying degenerative condition which might be temporarily aggravated by work activities but, long term, is not due to a work injury. Dr. Mitchell finds that, at most, the Claimant sustained a temporary aggravation of his chronic preexisting low back pain. She reported that gaps in the medical record make it difficult to state when the Claimant achieved his baseline status. However, because the October 31, 2014 medical record references back pain he attributes to moving a refrigerator in May of 2014 and he doesn't mention an October 17, 2014 injury, then by the October 31, 2014 medical visit, Dr. Mitchell would find him at MMI for any temporary aggravation due to work duties (Respondent's Exhibit D, p. 10).

29. Dr. Christopher Ryan performed an IME evaluation of the Claimant on April 8, 2015 and also prepared a written report (Claimant's Exhibit 1; Respondent's Exhibit G). Dr. Ryan interviewed the Claimant who reported that the Claimant stated,

> On the date of injury, he was having no difficulty at all, he tells me, and was able to work at this fairly heavy job, without symptoms and without restrictions. However, he tells me on the date of injury he had to reach forward quite a ways, to lift a fairly heavy box. He experienced sharp pain in his low back centrally, which extended into his buttocks, right more than left (Claimant's Exhibit 1, p. 1; Respondent's Exhibit G, p. 20).

30. Dr. Ryan also reviewed the Claimant's medical records prior to and subsequent to the October 17, 2014 injury date. Dr. Ryan notes that the Claimant had been seen on May 27, 2014, prior to his reported injury, with a diagnosis of lumbar muscle strain which had been present for two weeks prior to the visit. The Claimant had full range of motion in extension and flexion and was given Robaxin and ibuprofen (Claimant's Exhibit 1, p. 2; Respondent's Exhibit G; p. 21). Dr. Ryan notes the Claimant was seen again on July 14, 2014 for left foot pain and persistent low back pain from moving a refrigerator in May. The Claimant was provided a note to be off work for a

week (Claimant's Exhibit 1, p. 2; Respondent's Exhibit G, p. 21). Dr. Ryan notes the Claimant received medical treatment again on August 27, 2014, but there were no complaints of foot pain or back pain. Rather, the Claimant was treated for abdominal pain and vomiting. Dr. Ryan noted that the next medical record was dated October 21, 2014 and it was for the injury that is a part of the claim (Claimant's Exhibit 1, p. 2; Respondent's Exhibit G, p. 21).

31. Dr. Ryan noted an abnormal finding at the lumbosacral disc level on the Claimant's MRI report which he opined "may be part of his pain generation" and also felt "appears to be a more acute finding" as opposed to being consistent with a chronic process. Although, Dr. Ryan did state that he did not review the MRI image, but was relying on the report of the radiologist (Claimant's Exhibit 1, p. 3; Respondent's Exhibit G, p. 22).

32. On physical examination, Dr. Ryan found decreased range of motion. Dr. Ryan noted a lack of mobility related to the left sacroiliac joint and hypertonicity of the right lumbar paraspinous muscles. Dr. Ryan opines that this is consistent with his impression of asymmetry of mobility at the lumbopelvic articulation which he finds to be related to the Claimant's right-sided pain and decreased range of motion. He further opines that the injury that occurred on October 17, 2014 resulted in the mechanical injury to the Claimant's low back in the form of asymmetric lumbopelvic articulation and sacroiliac pain (Claimant's Exhibit 1, p. 3; Respondent's Exhibit G, p. 22).

33. Dr. Ryan recommended conservative treatment including physical therapy and modalities to control muscle spasm, coupled with work restrictions to prevent further exacerbation of his condition (Claimant's Exhibit 1, p. 4; Respondent's Exhibit G, p. 23).

34. Dr. Linda Mitchell testified by evidentiary deposition on May 11, 2015 (mistakenly noted as May 11, 2013 on the deposition transcript cover page). Dr. Mitchell testified as an expert in the area of occupational medicine and regarding Level II accreditation matters for Workers' Compensation cases (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, pp. 4-5). Dr. Mitchell testified that she also reviewed the IME report of Dr. Ryan and that the Claimant gave them both consistent histories of his work injury lifting a heavy box of broccoli (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 6). During her testimony, Dr. Mitchell makes much of the Claimant reporting a 10 out of 10 pain level and opines that this would be so incapacitating that the Claimant could not work (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 7). While the Claimant was actually working at that time, it should be noted that on March 30, 2015 (2 days before the IME), the Claimant received his first daily production reprimand for unsatisfactory production since August of 2014. It was noted on March 30, 2015, that the Claimant's daily production was 87.20% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 45). Thus, at this point in time, the Claimant's pain was interfering with his ability to perform his job duties. Dr. Mitchell also testified that on examination she noted some tightness in the Claimant's right lumbar musculature (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 9). Dr. Mitchell testified

that although the Claimant complained of diffuse low back pain, the provocative maneuvers that she performed on the Claimant did not illicit localized pain which would have indicated a pain generator (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, pp. 11-12). Dr. Mitchell testified that her review of the Claimant's MRI findings showed mild degenerative findings at L5-S1 with an annular tear with a protrusion of the disk to the left (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 12). Dr. Mitchell also testified that she reviewed Dr. Ryan's IME report and noted that the Claimant stated to Dr. Ryan that he had never injured his back which was what the Claimant initially told Dr. Mitchell at her examination (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 14). In comparing her physical examination of the Claimant to that of Dr. Ryan, Dr. Mitchell testified that they both found tightness in the right lumbar musculature but Dr. Ryan also noted poor mobility of the left SI joint, which Dr. Mitchell did not find. (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 15). Dr. Mitchell testified that she disagrees with Dr. Ryan's opinion that the injury that occurred on October 17, 2014 resulted from a mechanical injury to the Claimant's low back in the form of an asymmetric lumbopelvic articulation. Dr. Mitchell disagreed because she could not reconcile the reported pain on the right side with the abnormality Dr. Ryan noted in the left SI joint (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 16). Dr. Mitchell also disagreed with Dr. Ryan's opinion that the February 15th MRI showed an acute finding of a rupture rather than a chronic process. Rather, Dr. Mitchell opined that because the MRI references degenerative disk changes, to her that indicates a chronic process and not an acute rupture of the disk (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 17). Consistent with her written IME report, Dr. Mitchell does not find the Claimant's low back pain is due to a work injury and that he has returned to his baseline condition (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, pp. 17-18).

35. Dr. Christopher Ryan testified at the hearing as an expert witness in the area of physical medicine and rehabilitation and regarding Level II accreditation matters for Workers' Compensation cases (Hrg. Tr., pp. 29-30). Dr. Ryan testified that the Claimant had complaints of low back pain extending into the buttocks. He testified that the history of the injury the Claimant provided him on the date of his IME was consistent with the Claimant's testimony on the day of hearing, specifically that the Claimant attributed the injury to lifting while at work (Hrg. Tr., pp. 30-31). Dr. Ryan testified that on physical examination, the Claimant had limited range of motion, especially in lumbar extension. He testified that what stood out the most was the asymmetry of articulation of the sacroiliac joints where the spine and pelvis connect and the Claimant's posture when standing (Hrg. Tr., p. 31). Dr. Ryan opined that these findings were consistent with the Claimant's complaints and could correlate with the abnormality in the lumbosacral disc that was noted in the MRI report (Hrg. Tr., p. 32). Overall, Dr. Ryan finds that the Claimant has mechanical back pain most likely due to sacroiliac dysfunction and asymmetric articulation at the connection between the spine and pelvis with a possible element of discogenic pain which would require more information to determine. Dr. Ryan testified that once the dysfunction at the SI joint regained its symmetry and the muscle overlay normalized, then the discogenic pain could be explored (Hrg. Tr., pp. 33-34). The Claimant's prior back pain attributed to

moving a refrigerator in May of 2014 as documented in the Kaiser medical records and through the Claimant's testimony does not change Dr. Ryan's opinion regarding the October 17, 2014 mechanism of injury being the cause of his current low back issues. He testified that this is mainly because the pain was in a different area and with respect to the May 2014 incident, the Claimant had full range of motion and was able to return to work by July of 2014 (Hrg. Tr., p. 36). Dr. Ryan disagreed with Dr. Mitchell's opinion that the Claimant sustained a temporary aggravation of a chronic preexisting condition. He testified that the Claimant's condition isn't temporary; rather, his condition has been persistent in terms of pain and limitation of functional ability since the injury on October 17, 2014. Dr. Ryan also found the characterization of the Claimant's condition as preexisting to be absurd as the Claimant has never received a definitive diagnosis related to his back pain, only working diagnoses, or presumptive diagnoses, such as back strain (Hrg. Tr., pp. 38-39).

36. On cross-examination, Dr. Ryan testified that the acute finding he noted on the MRI report was an annular tear at one level where discs at all of the other levels were completely normal (Hrg. Tr., p. 52). With respect to the finding of mild discogenic degeneration changes at L5-S1, Dr. Ryan opines that this is general and not very precise language which is generally explained by a lack of context for the radiologist and therefore he does not give this statement much weight (Hrg. Tr., pp. 53-54).

37. Overall, the testimony of Dr. Ryan, supported by prior medical records, the Claimant's employment records and the testimony of the Claimant, is found to be more persuasive than that of Dr. Mitchell. It is found as fact that the Claimant's injury on October 17, 2014 caused, permanently aggravated and accelerated the Claimant's low back condition.

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 factual testimony and evidence regarding the Claimant's mechanism of injury, the ALJ found the Claimant's testimony to be credible and further found that the medical and employment records support the finding that the Claimant suffered an injury to his low back on October 17, 2014 while lifting an approximately 50 lb. box of broccoli. In regards to conflicting evidence in the form of an Incident Report dated October 17, 2014 that described the injury on the form as one of "repeated motion," this evidence was not found to be as credible or persuasive as the Claimant's testimony that he only lifted or grabbed one box of broccoli and that is how he injured his back. While the details of the mechanism of injury contained Incident Report are found to be inaccurate, pp. 38-39 of Respondent's Exhibit H supports the Claimant's testimony that he had an injury and that he reported it to supervisors on October 17, 2014.

Then, in considering the conflicting medical opinions regarding the Claimant's condition and a low back injury on October 17, 2014, 2014, the ALJ credits the medical opinions expressed by Dr. Christopher Ryan over the contrary opinions expressed by Dr. Linda Mitchell in her IME report and testimony. The ALJ found that the 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 the Claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credited the Claimant's testimony that he injured his low back when he lifted the box of broccoli while working on October 17, 2014 and has proven that it is more likely than

not that his low back and buttock symptoms were caused, aggravated or accelerated when he lifted the box of broccoli at work that day.

The ALJ also credited the Claimant's testimony that, although he had received medical treatment for back strains in the past, just prior to October 17, 2014, the Claimant was not experiencing symptoms that required medical treatment or that prevented him from performing 100% of his job duties. This testimony was supported by the fact that there are no records in evidence after August 31, 2014 through October 17, 2014 reprimanding the Claimant for failure to achieve daily production requirements or his 100% weekly minimum production requirement. As the evidence established that the Employer issues reprimands to the Claimant for even the most miniscule deviations from the production requirement (e.g. the 0.52% shortage for his August 15, 2014 daily requirement), from the lack of any written reprimands between August 31, 2017 and October 17, 2014, the ALJ infers that the Claimant did, in fact, meet 100% of his production goals in this time period and was able to perform all of the functions of his job, as the Claimant testified. Thus, the Claimant was not symptomatic during this time period for his low back for any preexisting condition or prior injury to a level that had an impact on his ability to perform his job duties.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on October 17, 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 that date.

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

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

The Claimant testified that he reported the October 17, 2014 incident to his supervisor "Brock" and to Rich Powelsick. The Claimant testified that neither of them sent him for medical care. Mr. Powelsick told the Claimant that he could go home and rest. An Incident Report was completed for the Claimant's injury and the form indicated that the incident report was "for information only." A second Employer form is also in the admitted exhibits and it provided that if an injury is "Information Only," the form is to be completed at the time of the injury report. The paperwork at pp. 38-39 of Respondent's Exhibit H supports the Claimant's testimony that he had an injury and that he reported it to supervisors on October 17, 2014. It further supports his testimony that he was not provided with the information for obtaining any medical treatment for his back injury. There was no paperwork or testimony presented in this case that representatives of the Respondent provided the Claimant with medical treatment or referrals for care. Thus, the right of selection of a physician passed to the Claimant.

Because he was not provided with medical treatment for his low back injury, the Claimant testified that he saw his personal physician at Kaiser Permanente and received work restrictions limiting him to 10 lbs. of lifting. The medical records show that on October 21, 2014, the Claimant saw Dr. Angie Martinez at Kaiser Permanente and was diagnosed with "acute back pain due to muscle spasm." Dr. Martinez advised the Claimant to discuss this case with his supervisor due to the onset of symptoms at work while lifting a crate of broccoli. Dr. Martinez recommended "better pain

management for muscle support and physical therapy." On October 31, 2014, the Claimant saw Dr. Emily Merrick at Kaiser Permanente. The Claimant was referred to a massage therapist and for physical therapy. Dr. Merrick also provided the Claimant with a letter verifying that the Claimant was treated at Kaiser on October 31, 2014 and that the Claimant could return to work on November 3, 2014 with a 10 lb restriction for lifting, pushing and pulling.

Before the October 17, 2014 work injury, the last prior medical treatment the Claimant had received for his low back occurred on July 14, 2014. At that time, the Claimant was provided with a medical note that he could resume work with no restrictions on July 22, 2014. Thus, between July 22, 2014 and October 17, 2014, the Claimant was not on medical restrictions, nor did the Claimant miss work due to low back problems.

The conservative medical care that the Claimant received to date from the physicians at Kaiser Permanente, and any referrals, was reasonably necessary to treat the Claimant's work-related condition. The medical records do not indicate that the Claimant's authorized treating physicians have placed the Claimant at MMI or released him to return to work without restrictions. The Claimant testified that he felt the onset of pain immediately upon lifting the box of broccoli on October 17, 2014 and he still does not feel good. The pain he now has is different than the pain he had after the refrigerator incident. With the refrigerator it was only a feeling of muscles that were hurting and inflamed. Now, his back and buttocks hurt and he cannot stand or sit for too long and the pain travels part way down his right leg from the hip along the side of the leg. The Claimant also testified credibly that now he even feels the pain when he tries to lay down to sleep and the pain keeps him from sleeping. The Claimant testified that his condition keeps him from performing 100% of his job duties as required by his Employer.

The credible and persuasive testimony of Dr. Ryan proves that, more likely than not, the Claimant has mechanical back pain most likely due to sacroiliac dysfunction and asymmetric articulation at the connection between the spine and pelvis with a possible element of discogenic pain which would require more information to determine. Dr. Ryan testified that once the dysfunction at the SI joint regained its symmetry and the muscle overlay normalized, then the discogenic pain could be explored. Dr. Ryan testified that the Claimant's condition isn't temporary; rather, his condition has been persistent in terms of pain and limitation of functional ability since the October 17, 2014 injury.

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.

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).

Employer records show the Claimant was absent starting October 18, 2014 until returning to work on January 9, 2015. The Claimant testified that he returned to work but his Employer did not offer a modified job, so, a little while after returning to work, he stopped working again and stayed home from about February 3, 2015 until March 13, 2015. He returned to work on March 13, 2014 but testified that his job requirements are that he must complete 100% of his production goal, yet, he can't do it.

The Claimant's work-related disability 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 for the entire

time he missed work due to his work injury. The Claimant is entitled to TTD benefits from October 18, 2014 until January 8, 2015 and again from February 3, 2015 through March 12, 2015.

ORDER

It is therefore ordered that:

1. The Claimant proved that he suffered a compensable work injury on October 17, 2014.

2. Medical treatment provided by Kaiser Permanente (and any referrals from the Kaiser physicians) was reasonably necessary to cure and relieve Claimant from the effects of his October 17, 2014 injury and Respondent 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 October 17, 2014 work injury, if any, as determined by his authorized treating physicians, and the Respondent is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

4. Claimant's AWW is the maximum for injuries occurring on October 17, 2014, per stipulation of the parties which was approved by the ALJ; and his corresponding TTD rate is $881.65 per week.

5. Respondents shall pay Claimant temporary total disability benefits for the periods of October 18, 2014 until January 8, 2015 and again from February 3, 2015 through March 12, 2015.

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

7. All matters not determined herein are reserved for future

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: October 15, 2015

Kimberly A. Allegretti
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 a right total hip arthroplasty is reasonable, necessary, and causally related to his November 26, 2014 work injury.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately five years as head car painter, with duties including sanding and painting cars in a paint booth.

2. On November 26, 2014 Claimant sustained an admitted left knee and cervical spine injury when he fell approximately twelve feet from the top of a paint booth. Claimant had attempted to climb a ladder to the top of the paint booth to manually release a stuck door, when the ladder slipped and he fell.

3. When Claimant fell twelve feet from the top of the paint booth, he landed primarily on his left leg and his left knee was in extreme pain. Claimant was sent to Concentra for treatment.

4. At Concentra, Claimant was evaluated on November 26, 2014 by Elizabeth Palmer, PA. Claimant reported that he was on the top of the roof coming down a ladder when the ladder started to sway, became off balance, and fell. Claimant reported falling approximately twelve feet and that he landed on a hyper extended left knee before falling to the ground. Claimant reported some neck soreness along the left lateral neck, and complained of left knee pain that he rated as 7/10. Claimant denied abdominal, shoulder, or hip pain. PA Palmer assessed accidental fall, left knee pain, internal derangement of knee, and cervical strain. PA Palmer referred Claimant to an orthopedic specialist for likely ACL/LCL tear. *See* Exhibit 4.

5. On December 1, 2014 Claimant returned to Concentra and was evaluated by Rosalie Einspahr, PA. PA Einspahr noted that Claimant was returning for a recheck of his neck injury and left leg injury. She found that his neck was swollen and tender, and that his left knee was tender diffusely in the anteromedial aspect, mid portion of the patella tendon, proximal patella tendon, medial patellar retinaculum, and quadriceps tendon. She noted that an MRI showed a lateral meniscal small or immature tear of red-white posterior horn, multiple loose bodies, and extensive capsulusynovitis. She continued the assessments and again referred Claimant for an orthopedic consultation. PA Einspahr noted that Claimant must use crutches. *See* Exhibit 4.

6. On December 1, 2014 Claimant underwent physical therapy with Angela Wilt, PT. Claimant reported coming down a ladder when it fell out from underneath him. Claimant reported landing mostly on his left leg. Claimant reported left knee pain, clicking in his neck when turning his head to the left, and reported pain all over and in his bilateral hips with prolonged sitting. *See* Exhibit I.

7. On December 5, 2014 Claimant was evaluated at Concentra by PA Palmer. PA Palmer noted that Claimant was returning for follow up of his left knee injury, hip injury, cervical strain/pain, and back pain. Claimant reported 7/10 pain in his left knee as well as left sided cervical muscle pain and popping and right hip pain. PA Palmer noted that Claimant was tender to palpation over the iliac crest of his right hip, but had full range of motion in his hip and was not tender to palpation in the groin. She also noted that Claimant had some right lower lumbar tenderness to palpation, and right knee tenderness to palpation. PA Palmer noted that the radiology results showed no acute fracture to Claimant's right hip. She assessed left knee pain, medical meniscus tear, loose bodies in the knee, cervical strain, acute hip pain, and accidental fall. *See* Exhibit 4.

8. On December 23, 2014 Claimant was evaluated at Concentra by Chelsea Rasis, PA. Claimant reported continued left knee pain, and increased bilateral hip pain, right worse than left. Claimant reported the hip pain had been present since the initial injury but that he had thought that he was just sore. Claimant reported he thought the hip pain seemed worse with overcompensation for the left knee pain and he noted the pain was in the bilateral hips especially in the right lateral groin. Claimant also reported cervical pain on the left side. PA Rasis noted that on examination Claimant was tender to palpation over the iliac crest with no groin tenderness to palpation. *See* Exhibit 4.

9. On December 29, 2014 Claimant was evaluated by PA Rasis. Claimant reported continued right hip pain that hurt all the time and reported that his hip now hurt worse than his left knee. Claimant reported his cervical strain was improving and that the left knee was improving slightly. PA Rasis ordered a MRI of the hip without contrast. *See* Exhibit 4.

10. On January 5, 2015 Claimant was evaluated by Stephen Danahey, M.D. Dr. Danahey noted Claimant was awaiting the right hip MRI and Dr. Danahey referred Claimant to an orthopedic specialist for his hip complaints. *See* Exhibit 4.

11. On January 6, 2015 Claimant underwent an MRI without contrast of his right hip that was interpreted by Charles Wennogle, M.D. Dr. Wennogle noted no acute fracture, apparent bilateral fat-containing indirect inguinal hernias, mild right osteoarthritic changes with subchondral cyst formation of the superior acetabulum and probable superior labral tear, and noted a prominent right femoral head/neck junction that may predispose to femoral acetabular impingement on the right. *See* Exhibit 5.

12. On January 15, 2015 Claimant was evaluated at Denver Metro Orthopedics by John Schwappach, M.D. Claimant reported right hip pain since a work

related injury when he fell off a 12 foot paint booth. Dr. Schwappach noted that Claimant had a limp and reduced range of motion in his right hip. He opined that Claimant had a labral tear in the right hip coupled with osteoarthritis. He noted it was causing Claimant daily pain and difficulty walking. Dr. Schwappach discussed with Claimant various treatment options including doing nothing, physical therapy, injections, NSAIDS, and surgery. Claimant elected to proceed with Mobic 7.5 mg po BID and with a right hip steroid injection. *See* Exhibit 6.

13. On February 10, 2015 Claimant underwent an intra-articular steroid injection of his right hip, performed by Shane Wheeler, M.D. Claimant reported the injection provided no relief.

14. On February 11, 2015 Claimant was evaluated by John Sacha, M.D. Claimant reported he had slipped off a ladder while working on a paint stand 12 feet off the floor. Claimant reported landing on first his left leg, then falling to his knees with an acute onset of left knee pain and left neck soreness. Dr. Sacha noted that at the third follow up appointment Claimant started noticing right and left hip pain, and later over a month after the injury, that he developed low back pain. Dr. Sacha noted that Claimant had pain localized to the right anterior superior and posterior hip, worse with walking. Dr. Sacha noted on examination of the right hip that Claimant had a positive hip rotation and compression test. Dr. Sacha opined that from a causality standpoint, only the issues complained of early in the case and put on the pain diagrams would likely be work related. Dr. Sacha opined that there seemed to be some non-physiologic versus secondary gain issues. Dr. Sacha prescribed a butrans patch. *See* Exhibit 7.

15. On February 12, 2012 Claimant reported to the emergency room of Swedish Medical Center Southwest. Claimant reported starting a butrans patch that day and then developing tongue swelling, wheezing, chest tightness, and an itchy rash. The patch was removed in the emergency department. *See* Exhibit 8.

16. On February 17, 2015 Dr. Sacha issued a special report. The report noted that over the weekend Claimant had a rash and shortness of breath from the butrans patch, and that Claimant went to the emergency room where he received opioid analgesics which broke his medication agreement. Dr. Sacha reported that Claimant was not a candidate for opioid analgesics or controlled substances from this point on and after advising Claimant of this on the telephone, Claimant became belligerent and hung up. Dr. Sacha noted that he had received all the medical records for Claimant and after reviewing them, he opined that the only areas work related were the neck and the left knee. He opined that Claimant's other expansive complaints including the low back, legs, hips, arms, and other areas were not work related. *See* Exhibit 7.

17. On February 20, 2015 Claimant was evaluated by Dr. Schwappach. Claimant reported continued right hip pain. Claimant reported that the steroid injection provided no relief and that he had continued worsened pain in the lateral and anterior hip. Claimant reported having an allergic reaction to the Butrans patch that Dr. Sacha gave him. Dr. Schwappach continued to assess right hip pain and noted Claimant's

difficulty with the left knee and neck which may also be contributing to Claimant's overall pain and discomfort. *See* Exhibit 6.

18. On April 6, 2015 Claimant was evaluated by Dr. Schwappach. Claimant reported being extremely upset and frustrated at his lack of progress. Claimant again reported that the steroid injection in his hip provided no relief. Dr. Schwappach opined that Claimant had degenerative joint disease of the right hip and that he had right hip osteoarthritis confirmed by radiographs. Dr. Schwappach opined that Claimant was not a candidate for hip arthroscopy. He noted that he discussed with Claimant various options including doing nothing, physical therapy, injections, NSAIDS, and surgery. He noted that Claimant decided to proceed with right total hip replacement and that the surgery would be requested through workers' compensation. *See* Exhibit 6.

19. On August 5, 2015 Claimant underwent an Independent Medical Evaluation performed by James Lindberg, M.D. Claimant reported constant right hip pain. Claimant reported that on November 26, 2014 he fell and landed on his left side with his knee flexed and thought his left knee was broken. Claimant reported prior to this injury he had normal aches and pains but no injuries. Claimant reported he had no prior hip pain. Claimant reported he had an injection in his right hip on February 10, 2015 that provided no help short or long term. Claimant reported that Dr. Schwappach had recommended a total hip arthroplasty. *See* Exhibit 10.

20. Dr. Lindberg opined that x-rays of Claimant's hip and pelvis performed on January 15, 2015 were within normal limits. He opined that an MRI of Claimant's hip on January 6, 2015 showed no degenerative changes but showed a posterior bump on the femoral neck with a pistol grip deformity signifying femoral acetabular impingement syndrome and a questionable superior labral tear. Dr. Lindberg opined that Claimant had pre-existing femoral acetabular impingement that was the cause of his superior labral tear, and that the fall from the ladder was not the cause of the superior labral tear. Dr. Lindberg opined that if Claimant had a significant injury to his hip that caused a labral tear at the time of the incident, Claimant would have had immediate complaints of hip pain. *See* Exhibit 10.

21. Dr. Lindberg opined that surgical intervention should not be done under workman's compensation. He opined that Claimant did not land on or injure his right hip in the incident and that Claimant had a pre-existing congenital abnormality that resulted in femoral acetabular impingement in his right hip. Dr. Lindberg further opined that there was no indication for a total hip arthroplasty since Claimant received no relief from the intra-articular hip injection. Dr. Lindberg opined that the injection ruled out intra-articular pathology as the cause of Claimant's pain. *See* Exhibit 10.

22. The Medical Treatment Guideline address total hip replacements and list the surgical indications and considerations as being: severe osteoarthritis, all reasonable conservative measures exhausted, and other reasonable surgical options considered or implemented. *See* Exhibit L.

23. Dr. Lindberg testified at hearing consistent with his report. Dr. Lindberg opined that Claimant did not sustain a labral tear on November 26, 2014 and noted that if Claimant had sustained an acute labral tear he would have complained of intense pain to his hip joint and would not have been able to bear weight on his right lower extremity. Dr. Lindberg opined that Claimant's use of crutches to compensate for his left knee pain and the lack of any immediate right hip pain cut against Claimant having sustained a labral tear. Dr. Lindberg further opined that the right hip x-ray was within normal limits, that the MRI showed no degenerative changes except for a small acetabular cyst, and that it showed no changes in the articular cartilage of the hip joint.

24. Dr. Lindberg opined that a total hip replacement would be performed to treat a patient with osteoarthritis of the hip or a questionable labral tear that caused intra-articular pain. Dr. Lindberg opined that Claimant did not have intra-articular pain and that Claimant's pain was more likely generated outside the hip capsule, making a total hip replacement unwarranted. Dr. Lindberg opined that if Claimant's pain was intra-articular, Claimant would have received significant relief from the intra-articular injection. However, since Claimant reported no relief, it was unlikely that the pain was intra-articular.

25. Dr. Lindberg opined that under the medical treatment guidelines, Claimant did not sustain any repetitive rotational force or trauma or high energy trauma to his right hip when he fell which would have caused the labral tear.

26. Claimant's testimony is found credible and persuasive. Claimant did not have any hip problems or symptoms prior to the November 26, 2014 work injury. Claimant immediately had soreness all over and severe left knee pain. Within 5 days of the injury and on December 1, 2015 Claimant first reported bilateral hip pain while at physical therapy. Claimant is credible that he initially thought he was just sore all over from the fall, but several days later realized the pain in his right hip had not gone away and was getting worse.

27. The testimony and opinions of Dr. Lindberg are found credible in part. Dr. Lindberg is persuasive and credible in opining that Claimant does not need a total hip replacement and that a total hip replacement is not reasonable and necessary. Claimant did not receive any relief from an intra-articular hip injection which, as credibly opined by Dr. Lindberg, points to his source of pain as not being intra-articular.

28. Dr. Lindberg, however, is not credible in his opinion that Claimant's right hip pain and symptoms are unrelated to the work injury. The ALJ finds persuasive that Claimant suffered a substantial fall on November 26, 2014, that Claimant had a significant injury to his left knee which took the brunt of the fall, and that Claimant also within several days had reports of right hip pain. Dr. Sacha and Dr. Lindberg both base a large part of their opinions on the idea that Claimant would have complained immediately of right hip pain if he injured his right hip in the fall. However, the ALJ finds more persuasive that Claimant was so focused on his knee injury and just believed he was sore all over until five days later when his hip continued to bother him and he

reported it to the physical therapist. Claimant made a report within several days of his fall, he had no prior symptoms in his hip, and the ALJ finds persuasive that he suffered a hip injury on November 26, 2014.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a),

C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003).

Claimant has met his burden to show, more likely than not, that treatment of his right hip is causally related to the injury he suffered on November 26, 2014. Claimant is credible that prior to that date he had no symptoms or history of right hip pain. Claimant reported right hip pain on December 1, 2015, just five days after his fall. Claimant is credible that he initially believed he was just sore all over but that the hip pain did not go away. The opinions of Dr. Sacha and Dr. Lindberg that the right hip pain is not causally related to the work injury are based heavily on the lack of initial complaints of right hip pain when Claimant was first seen on November 26, 2014. However, the ALJ finds Claimant persuasive that he had hip pain immediately but believed he was just sore and had pain all over. The ALJ also finds it persuasive that he was concerned with the extreme pain in his left knee initially. Within a couple of days of the injury, Claimant realized his right hip pain had not gone away and reported it at physical therapy and at his next medical appointments. Therefore, the Claimant has established that right hip treatment is causally related to the claim. Although Claimant has established that treatment of his right hip is causally related to the claim, he has failed to establish at this point that a right total hip replacement is reasonable and necessary to cure and relieve him from the effects of his right hip injury.

The medical records and Claimant's reports support that fact that the right hip intra-articular injection provided Claimant with no relief. Dr. Lindberg is persuasive that this points against the need for a total hip replacement as a total hip replacement would not be necessary if the pain was from an extra-articular source. Here, Dr. Lindberg credibly opined that the injection ruled out an intra-articular source of Claimant's pain. Further, the Claimant does not meet the medical treatment guidelines for a total hip replacement. He does not have severe osteoarthritis and the medical providers have not yet exhausted all reasonable conservative measures or explored reasonable surgical options. Dr. Schwappach's request for right total hip replacement is not detailed nor does it provide an explanation for the recommendation for a total hip replacement even after a non-diagnostic response to the intra-articular hip injection. For these reasons, Claimant has failed to meet his burden to show that a right total hip replacement is reasonable and necessary. Performing a total hip replacement at this point when the diagnostic injection does not support it is not reasonable or necessary.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that treatment of his right hip is causally related to the November 26, 2014 work injury.

2. However, Claimant has failed to establish by a preponderance of the evidence that a right total hip arthroplasty is reasonable and necessary. His request for right total hip arthroplasty is denied.

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: October 30, 2015 /s/ Michelle E. Jones

_____

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that his January 29, 2015 approved Full and Final Settlement Agreement with Respondents should be reopened based on fraud.

FINDINGS OF FACT

1. Claimant worked for Employer as a Security Guard. Claimant asserted that on approximately May 1, 2014 he suffered compensable injuries to body parts that included his right and left shoulders.

2. Because the parties wished to avoid the expense and uncertainty of litigation, they executed a Full and Final Settlement Agreement on January 29, 2015. The Agreement provided that Claimant would receive $10,000 from Respondents in exchange for a full and final settlement of his May 1, 2014 Workers' Compensation claim.

3. The Settlement Agreement included the "Standard Settlement Agreement for Unrepresented Claimants" and the "Standard Settlement Order" as required by Workers' Compensation Rule of Procedure 7-2. Because Claimant was unrepresented a settlement proceeding was conducted on February 6, 2015 before Pre-Hearing Administrative Law Judge (PALJ) Michael Barbo.

4. At the settlement proceeding Claimant acknowledged that he had signed the documents that PALJ Barbo was considering for approval. Claimant noted that he had read the Settlement Agreement prior to signing it. He remarked that he had no questions about the Settlement Agreement.

5. Claimant informed PALJ Barbo that he understood the $10,000 payment from Respondents constituted a complete settlement of his May 1, 2014 claims. PALJ Barbo explained to Claimant that, if the Settlement was approved and he later changed his mind and did not want to settle, he would still be bound by the Settlement Agreement. Claimant responded, "Yes, sir, I understand that, Your Honor."

6. PALJ Barbo advised Claimant that he had the right to stop the proceeding if he wanted to obtain the advice of counsel. Claimant stated that he did not want to postpone approval of the Settlement Agreement in order to consult with an attorney. He represented that he wanted the Settlement Agreement finalized that day.

7. PALJ Barbo inquired whether Claimant was under the influence of any medications that might interfere with his ability to understand the proceedings. Claimant responded that he was not under the influence of any medication.

8. Claimant told PALJ Barbo that he did not feel forced to sign the Settlement Agreement. He explained that he was voluntarily settling his claim on a full and final basis.

9. Claimant acknowledged that he would not be able to obtain medical benefits from Respondents for injuries sustained on May 1, 2014 if PALJ Barbo approved the Settlement Agreement. He also recognized that he would not be entitled to receive medical maintenance benefits if the Settlement Agreement was approved. Finally, Claimant agreed that, if he could not work again, he was releasing Respondents from paying potential Permanent Total Disability (PTD) benefits.

10. PALJ Barbo inquired whether Claimant still wanted him to approve the Settlement Agreement. Claimant responded that he wanted PALJ Barbo to sign and approve the Agreement.

11. On February 6, 2015 PALJ Barbo approved the Settlement Agreement executed by Claimant and Respondents. PALJ Barbo's signed Order required Respondents to make payments in accordance with the Settlement Agreement.

12. While PALJ Barbo was signing the order approving the Settlement Agreement, Claimant and a representative for Respondents discussed the disbursement of the $10,000 settlement check. Claimant inquired whether he could pick up the check from Insurer within the next 20 minutes. Claimant subsequently picked up the $10,000 settlement check from Insurer.

13. On June 15, 2015 Claimant filed an Application for Hearing seeking to rescind the approved Settlement Agreement resolving his May 1, 2014 Workers' Compensation claims. Claimant also filed a Petition to Reopen alleging "fraud" as the basis for reopening.

14. Claimant based his allegations of fraud on Employer's actions prior to the settlement of his claim. He essentially asserted that he was fraudulently induced to sign a document for Employer stating he would not pursue a Workers' Compensation claim. Claimant contended that the document waived his right to make a claim for his May 1, 2014 injuries.

15. In response to Claimant's request to rescind the approved Settlement Agreement and reopen the claim, Respondents informed Claimant they would not voluntarily reopen his claim. Respondents advised Claimant that the statement he signed with Employer prior to the settlement of his claim did not constitute a binding agreement that barred him from pursuing his claim. In fact, Claimant pursued his claim and settled the matter on a full and final basis in exchange for $10,000.

16. Claimant has failed to demonstrate that it is more probably true than not that his January 29, 2015 approved Full and Final Settlement Agreement with Respondents should be reopened based on fraud. Claimant bases his allegations of fraud on Employer's actions prior to the settlement of his claim. He essentially asserts that he was fraudulently induced to sign a document for Employer stating he would not pursue a Workers' Compensation claim. Claimant contends that the document waived his right to make a claim for his May 1, 2014 injuries. However, Claimant pursued his claim and received valuable consideration in the form of $10,000 when he executed the Settlement Agreement. The Settlement Agreement does not contain any reference to a document waiving his right to pursue a claim and constitutes the entire agreement of the parties.

17. The terms of the Settlement Agreement approved by PALJ Barbo were clear and unambiguous. The Settlement Agreement thus must be enforced as written without reference to extrinsic evidence. Claimant's statements to PALJ Barbo reflect a clear intent to proceed with a full and final settlement of his May 1, 2014 claims. He specifically expressed that he was not coerced to sign the Settlement Agreement. Moreover, the Settlement Agreement reveals that Claimant executed the document of his own free will and without force, pressure or coercion. Claimant acknowledged that the "settlement agreement contains the entire agreement between the parties and shall be binding upon the parties when approved." He also recognized that he would not be entitled to receive medical maintenance benefits if the Settlement Agreement was approved. Finally, Claimant agreed that if he could not work again he was releasing Respondents from paying potential PTD benefits. Accordingly, Claimant's Petition to Reopen his January 29, 2015 approved Full and Final Settlement Agreement with Respondents is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. A settlement agreement is in the nature of a written contract that must be interpreted in accordance with the general rules that apply to the construction of contracts. *In Re Hickam,* W.C. No. 4-441-053 (ICAP, Jan. 15, 2004); *see Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117, 118 (Colo. App. 1993). The general rules of contract interpretation provide that when the contract terms are clear and unambiguous the contract must be enforced as written. *Cary,* 867 P.2d at 119. In determining whether the settlement agreement is ambiguous "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fibreglas Fabricators, Inc. v. Kylberg,* 799 P.2d 371, 374 (Colo. App. 1990). Evidence that the parties ascribe different meanings to contract terms does not compel the conclusion that the contract is ambiguous. *Dorman v. Petrol Aspen, Inc.* 914 P.2d 909, 912 (Colo. 1996).

5. An order approving a settlement agreement effectively closes a claimant¹s Workers¹ Compensation case. *See Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246, 1255 (Colo. 1998). Section 8-43-303(1), C.R.S., provides that a settlement may be reopened at any time on the ground of fraud. The party seeking to reopen an award bears the burden of proof to establish the appropriate grounds to reopen. To reopen a Workers' Compensation claim based on fraud, a claimant must prove that the respondents made false representations on which the claimant relied to settle the claim. *Trimble v. City and County of Denver,* 697 P.2d 716, 724 (Colo. 1985); *In Re Hickam,* W.C. No. 4-441-053 (ICAP, Jan. 15, 2004). The elements of fraud are: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it was false; (3) ignorance on the part of the one to whom the representation was made of its falsity; (4) the representation was made with an intention that it be acted on; and (5) the representation resulted in damage. *Concord Realty Co. v. Continental Funding Corp.*, 776 P.2d 1114, 1117-18 (Colo. 1989); *Beeson v. Albertson's, Inc.*, W.C. No. 3-968-056 (ICAP, Apr. 30, 1996).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that his January 29, 2015 approved Full and Final Settlement Agreement with Respondents should be reopened based on fraud. Claimant bases his allegations of fraud on Employer's actions prior to the settlement of his claim. He essentially asserts that he was fraudulently induced to sign a document for Employer stating he would not pursue a Workers' Compensation claim. Claimant contends that the document waived his right to make a claim for his May 1, 2014 injuries. However, Claimant pursued his claim and received valuable consideration in the form of $10,000 when he executed the Settlement Agreement. The Settlement Agreement does not contain any reference to a

document waiving his right to pursue a claim and constitutes the entire agreement of the parties.

7. As found, the terms of the Settlement Agreement approved by PALJ Barbo were clear and unambiguous. The Settlement Agreement thus must be enforced as written without reference to extrinsic evidence. Claimant's statements to PALJ Barbo reflect a clear intent to proceed with a full and final settlement of his May 1, 2014 claims. He specifically expressed that he was not coerced to sign the Settlement Agreement. Moreover, the Settlement Agreement reveals that Claimant executed the document of his own free will and without force, pressure or coercion. Claimant acknowledged that the "settlement agreement contains the entire agreement between the parties and shall be binding upon the parties when approved." He also recognized that he would not be entitled to receive medical maintenance benefits if the Settlement Agreement was approved. Finally, Claimant agreed that if he could not work again he was releasing Respondents from paying potential PTD benefits. Accordingly, Claimant's Petition to Reopen his January 29, 2015 approved Full and Final Settlement Agreement with Respondents is denied and dismissed.

ORDER

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

Claimant's Petition to Reopen his January 29, 2015 approved Full and Final Settlement Agreement with Respondents 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: October 27, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issues presented for determination at hearing were:

1. Whether Claimant has proven by a preponderance of evidence that she is entitled to PPD benefits for a scheduled right lower extremity impairment rating for her December 13, 2013 injury, and, if so, the correct impairment rating.

2. Whether the Claimant has proved by a preponderance of the evidence that future medical benefits are reasonably necessary to relieve the effects of her December 13, 2013 injury or prevent deterioration of her condition and maintain maximum medical improvement

3. Whether the Claimant has proven by a preponderance of the evidence that she is entitled to penalties pursuant to C.R.S. §§8-43-304(1) and 8-42-104(5)(a) for failing to properly apportion permanent partial disability benefits from December 18, 2014 ongoing.

FINDINGS OF FACT

1. The Claimant was employed by Employer as a student advocate for at-risk middle school students. She began working in this position in August 2012 and is still employed there (Hrg. Tr., p. 17).

2. At the hearing, the Claimant testified that she injured her right leg on December 13, 2013. She also testified that she previously suffered a prior injury to the same knee in July of 2007 (Hrg. Tr., p. 17).

3. The Claimant testified that her prior injury occurred when she was working in a restaurant and fell on a wet floor. She underwent two surgeries as a result of the July 2007 injury. The Claimant testified that at the conclusion of that injury she received an impairment rating from Dr. Krebs for a 23% lower extremity impairment. She then proceeded to DIME evaluation with Dr. Gellrick who provided a 22% lower extremity impairment rating (Hrg. Tr., pp. 18-19). The Claimant testified that as the 2007 knee claim was coming to a close, Dr. Bynam and others advised the Claimant that some time in the future, the Claimant would need to have her knee replaced (Hrg. Tr., p. 19). The Claimant's testimony in this regard is in accord with the medical records admitted in this case, is credible, and is found as fact.

4. The Claimant testified that on December 13, 2013 she was on her way into the school and she hit a patch of ice, lost her balance and fell. She testified that she

knew immediately that she hurt her leg (Hrg. Tr., p. 19). She was taken to the ER for x-rays and an MRI and she requested to see Dr. Bynam. The Claimant stated that she saw him two days later and he put her in one of the braces she had from her prior injury and she was placed on crutches (Hrg. Tr., p. 20). This testimony is consistent with the medical records, is credible, and is found as fact.

5. The Claimant testified that just before her December 13, 2013 injury, the condition of her knee involved constant pain in her hamstring area and swelling with normal activities along with her knee popping (Hrg. Tr., pp. 20-21). The Claimant testified that these symptoms remained consistent and stable since she had been placed at MMI for the 2007 injury (Hrg. Tr., p. 21).

6. After the December 13, 2013 injury, the Claimant testified that the symptoms are the same type as before, but the swelling is worse with "pulling on the left side" at the hamstring. The hamstring pain and the popping remain (Hrg. Tr., p. 22).

7. The Claimant testified that it is her understanding that Dr. Bynum is stating that the Claimant needs a future knee replacement but that he attributes the need for this to the earlier 2007 injury. She further testified that in terms of any medical care that she might need for the December 2013 injury, she would defer to Dr. Bynam and whatever he has said in the record (Hrg. Tr., p. 23). The Claimant testified that she trusts Dr. Bynam's opinion that her future treatment is related to her first injury, that she has arthritis as a result of her first injury and that she has returned to the baseline level where she was before the second injury (Hrg. Tr., pp. 26-27). The Claimant agrees that she needs a total knee replacement but, per Dr. Bynam's recommendation, she is waiting as long as she can because she is young for a knee replacement surgery (Hrg. Tr., p. 27).

July 1, 2007 Knee Injury

8. The Claimant first saw Dr. C. Kelly Bynum on October 14, 2008 related to a July 1, 2007 injury to the right knee when the Claimant fell on wet tile. Dr. Bynam noted that the Claimant had a lateral tibial plateau fracture that was treated without operation. She subsequently underwent right knee surgery performed by Dr. Dwyer on January 16, 2008, after which the Claimant was reporting right knee ache and popping with no true instability but occasional hyperextension going down stairs. The Claimant also reported a history of right knee ACL reconstruction performed by Dr. Winkler in 1983. The Claimant reported that her knee was stable and functioned well after the 1983 procedure until the 2007 injury. On physical examination, Dr. Bynum noted right quad atrophy as compared to the left. Dr. Bynum characterized the Claimant's symptoms as more "aching" than "instability" with ACL and MCL laxity. Dr. Bynum recommended a quad conditioning program, a functional knee brace and an injection. Dr. Bynum noted that in the long term, the Claimant is "looking at a total knee arthroplasty" (Claimant's Exhibit 1, pp. 1-2; Respondent's Exhibit A, pp. 1-2).

9. As of November 18, 2008, Dr. Bynam noted that the Claimant would pursue right knee ACL reconstruction, medial collateral advancement and repair in order to reestablish functional stability versus doing a total knee arthroplasty at that point. Dr. Bynam noted that the Claimant "does understand that this may fail and she could come to a total knee arthroplasty in the short term as well" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit A, p. 3).

10. The Claimant continued to treat with Dr. Bynam and, as of March 10, 2009, the Claimant was still considering her surgical options as she found it unacceptable to live with the current condition of her knee. By this date, the Claimant wanted to undergo right knee diagnostic arthroscopy with likely allograft ACL reconstruction and medial collateral ligament repair. Dr. Bynam noted that this would help with stability and pain from instability but not the underlying arthritic aching. As of this appointment, the Claimant did not want to undergo a total knee arthroscopy and Dr. Bynam did not recommend it specifically, although Dr. Bynam is clear that the TKR is in the Claimant's long-term future (Claimant's Exhibit 1, p. 6; Respondents' Exhibit A, p. 6).

11. On April 20, 2009, the Claimant underwent a right knee arthroscopic allograft tibialis anterior ACL reconstruction, partial medial menisectomy and chondroplasty of the patellar separate compartment. During the surgery, Dr. Bynam determined that MCL repair was not warranted (Claimant's Exhibit 1, pp. 8-11; Respondents' Exhibit A, pp. 8-11). After the surgery, there was some swelling and pain and concerns about infection, but cultures taken were ultimately negative. The swelling and hamstring pain persisted post-surgery through August 4, 2009 (Claimant's Exhibit 1, p. 18; Respondents' Exhibit A, p. 17). By October 7, 2009, the Claimant had undergone several knee aspirations secondary to persistent swelling, but cultures were negative until the most recent aspiration that was positive for gout. The Claimant was started on allopurinol, 200 mg a day to treat the gout. Dr. Bynam noted that "long term, she is at risk for developing worsening arthritis…the right knee could have a series of Synvisc injections, long-term needing total knee" (Claimant's Exhibit 1, p. 23; Respondents' Exhibit A, p. 20).

12. As of May 12, 2010, Dr. Bynam noted the Claimant had improved after Synvisc injections but her symptoms were not fully resolved. The Claimant reported no longer having the instability symptoms although she did have post menisectomy syndrome, postinjury arthritis and chondral changes. Dr. Bynam opined the Claimant was at MMI at this point, but noted, "long term I do think she may need future treatment, including future steroid injections, possible therapy and total knee arthroplasty" (Claimant's Exhibit 1, p. 29; Respondents' Exhibit A, p. 26).

13. Dr. Caroline Gellrick performed a Division Independent Medical Examination (DIME) with an examination date of March 4, 2011 related to the Claimant's July 1, 2007 injury (Respondents' Exhibit F). Dr. Gellrick agreed with Dr. Bynam that the Claimant was at MMI for the right knee injury (Respondents' Exhibit F, p. 80). Dr. Gellrick provided a lower right extremity rating of 22% (which would equate to

a 9% whole person impairment rating) due to the lateral meniscus menisectomy, partial, medial meniscus menisectomy and ACL reconstruction, along with loss of range of motion (Respondents' Exhibit F, pp. 81-82).

14. The insurer for the 2007 injury filed a Final Admission of Liability for the July 1, 2007 injury on April 4, 2011 in accordance with Dr. Gellrick's DIME report admitting for a 22% scheduled impairment (Respondents' Exhibit K, p. 122).

December 13, 2013 Knee Injury

15. Dr. Bynam saw the Claimant again on December 16, 2013 for a December 13, 2013 injury to her right knee. The Claimant reported that she was at work and slipped and fell on ice outside and fell on her right knee. The Claimant was able to get up and walk but experienced an immediate onset of pain. She was seen in the emergency room and an MRI showed a fracture. Dr. Bynam noted the MRI showed an effusion with an intact ACL reconstruction. Dr. Bynam also noted the MRI showed chondral wear and tear and some changes about her meniscus along with a nondisplaced lateral tibial plateau fracture (Claimant's Exhibit 1, pp. 30-32; Respondents' Exhibit A, pp. 27-28).

16. The Claimant was first evaluated and treated by Dr. Craig Tipping on December 20, 2013 for her December 13, 2013 knee injury due to the fall on ice. He noted that the Claimant had been seen at the emergency department for this injury. Dr. Tipping also noted the Claimant's prior knee injuries including a 1982 skiing accident with an ACL tear followed by surgery performed by Dr. Winkler, and then a 2008 meniscal repair by Dr. Dwyer and ACL reconstruction by Dr. Bynam (Claimant's Exhibit 3, p. 79). Dr. Tipping assessed the Claimant with right posterolateral tibial plateau fracture, nondisplaced, prior ACL cadaver graft – intact, degenerative menisci to the right knee and possible PTSD and depression secondary to multiple injuries to the right knee and anticipation of a long recovery (Claimant's Exhibit 3, p. 80). Dr. Tipping provided the Claimant with work restrictions of limiting walking and standing to 1 hour per day, sitting to 8 hours per day, and noting the Claimant must use crutches and be non-weight bearing on her right leg. She was referred to Dr. Bynam for evaluation (Claimant's Exhibit 3, p. 81). The Claimant followed up with Dr. Tipping on January 17, 20014 and he continued her work restrictions (Claimant's Exhibit 3, p. 84). The Claimant's condition continued to improve through February 28, 2014 and she was tapering off crutches gradually (Claimant's Exhibit 3, pp. 85-90).

17. The Claimant went on a planned trip to Europe with her daughter after the injury and on returning home, Dr. Bynam recommended physical therapy which the Claimant did in January and February of 2014. By March 3, 2014, the Claimant reported a worsening of her symptoms with a pain level of 7/10. The Claimant also reported that the day before, she was just standing on her right knee when it seemed to buckle and caused immediate medial pain and continued pain with ambulating (Claimant's Exhibit 1, p. 42; Respondents' Exhibit A, p. 36).

18. On March 14, 2014, the Claimant reported a new incident to Dr. Tipping when she was standing on her right leg while putting on pants and she had a valgus stress to the knee and felt immediate pain. She was evaluated by Dr. Bynam after this and he put her back into a knee brace for six weeks. Dr. Tipping noted the fracture did not seem to be aggravated by the recent fall (Claimant's Exhibit 3, p. 91).

19. As of March 26, 2014, the Claimant reported to Dr. Bynam that she had significant improvement of her knee symptoms but ankle pain due to a recent ankle twist incident on March 23, 2014 (Claimant's Exhibit 1, p. 46; Respondents' Exhibit A, p. 38).

20. As of April 11, 2014, the Claimant reported another injury to the right leg when she was taking the trash out and tripped in her carport twisting her ankle and causing a valgus deformity to her right knee. The Claimant was without crutches or a cane at that visit but Dr. Bynam had put the Claimant into an ankle brace (Claimant's Exhibit 3, p. 94). On May 2, 2014, Dr. Tipping noted the Claimant was doing much better. He noted that although she still had pain and was limping, she was no longer using a cane, crutches or a brace (Claimant's Exhibit 3, p. 97). Dr. Tipping noted that the Claimant's care was being transferred to Dr. Olson and that she would also continue with Dr. Bynam (Claimant's Exhibit 3, pp. 98-99).

21. The Claimant first saw Dr. Daniel Olson for treatment for her December 13, 2013 injury on May 12, 2014. Dr. Olson noted that "due to instability and disuse," the Claimant reinjured the same knee and sprained her ankle, although the Insurer was denying liability for the ankle (Claimant's Exhibit 2, p. 63). On June 24, 2014, Dr. Olson noted the Claimant was making "very slow but detectable progress" (Claimant's Exhibit 2, p 70). By October 2, 2014, Dr. Olson reported that the Claimant was making good progress and noted that an IME doctor opined the Claimant was at MMI and that her ankle sprain was not related to the work injury. Dr. Olson noted that Dr. Bynam wanted to see the Claimant one more time. Dr. Olson also disagreed with the insurance company stance that the Claimant's ankle and knee sprains were unrelated to the work injury (Claimant's Exhibit 2, pp. 74-75). Dr. Olson placed the Claimant at MMI as of October 2, 2014 with a maintenance care visit with Dr. Bynam. Dr. Olson referred the Claimant to Dr. O'Meara for an impairment rating (Claimant's Exhibit 2, p. 76).

22. When the Claimant saw Dr. Bynam on June 23, 2014, Dr. Bynam noted a significant improvement in the symptoms. There was still some hamstring pain in the leg and the Claimant had concerns that the knee might give out when she is on hills, but it had not done so. Dr. Bynam opined that she expected the Claimant to be at MMI in a couple of months after a self-directed exercise program. However, Dr. Bynam noted that the Claimant "will need long term considerations for potential knee replacement (Claimant's Exhibit 1, pp. 53-54; Respondents' Exhibit A, pp. 43-44).

23. On August 19, 2014, Dr. James Lindberg performed a record review beginning with the January 16, 2008 operative note of Dr. Thomas Dwyer through a medical note of Dr. Olson on July 24, 2014. From the written review, it is not clear if Dr.

Lindberg had all of the medical notes between those dates or if he was only in possession of select records in that time frame. Dr. Lindberg opined that the December 13, 2013 injury diagnosed as a nondisplaced tibial plateau fracture would be expected to heal in six weeks. As of the date of his review, Dr. Lindberg opined the Claimant had reached MMI and had no permanent impairment from this injury. He further opined that, the Claimant's "pre-existing arthritis and other issues predated these injuries" and "the non-displaced tibial plateau fracture has no bearing on causing the need for a total knee replacement" rather this would result from the ACL surgery done after the 2007 injury (Respondents' Exhibit C).

24. On October 20, 2014, the Claimant saw Dr. Bynam for follow up and, in discussing a record review report prepared by Dr. Lindberg dated August 19, 2014, Dr. Bynam concurs that the Claimant's "need for potential total knee in the future should be related to her primary ACL injury and meniscus injuries." In the treatment plan, Dr. Bynam discusses that the Claimant is at MMI and that, although the Claimant may need future treatments, injections, therapy and potential knee replacement, "that should be directed back to her initial knee injury" (Claimant's Exhibit 1, p. 59; Respondents' Exhibit A, p. 49).

25. The Claimant saw Dr. Patrick O'Meara for an impairment rating and placement at MMI on December 2, 2014 for her December 13, 2013 injury. The Claimant reported her mechanism of injury of falling on an ice patch while walking across the parking lot. After x-rays, the Claimant was initially told that nothing was broken, but when the MRI came back, she was advised that she had a tibial plateau fracture. The Claimant advised Dr. O'Meara of her two previous knee surgeries with Drs. Dwyer and Bynum. She also reported to Dr. O'Meara that she has continued aching in the knee, especially posteriorly, in her hamstrings. She also reported swelling and pain that is constant but gets progressively worse with use and is at its worst at the end of the day (Claimant's Exhibit 5, p. 110; Respondents' Exhibit B, p. 51). Dr. O'Meara reviewed the Claimant's 12/13/13 x-rays and MRIs from 12/13/13, 09/17//09 and 10/17/07 and conducted a physical examination. He also reviewed medical records from the current injury as well as older records from 2007 – 2010. Dr. O'Meara assessed the Claimant with degenerative joint disease with grade IV chondral loss, ACL rupture with repair, tibial plateau fracture, medial and lateral meniscus injuries, status post partial medial menisectomy, right MCL sprain, resolved, and right anterior talafibular ligament sprain, non-occupational, resolved. Dr. O'Meara concurred with Dr. Bynam that the Claimant was at MMI for the December 13, 2013 injury as of June 23, 2014. He noted that the Claimant does have restrictions due to her knee dysfunction, but found this was "due to her prior degenerative changes, not due to her 12/13/13 tibial plateau fracture" (Claimant's Exhibit 5, pp. 115; Respondents' Exhibit B, p. 56). Dr. O'Meara noted that the Claimant will need future medical care, including a likely total knee arthroplasty, but also states that "this was recommended before her placement at MMI for her 07/02/07 injury and was considered to be inevitable." Dr. O'Meara provided the Claimant with an impairment rating for her lower extremity for the specific disorders and range of motion deficits of 40% which would convert to a 16% whole person impairment. However Dr. O'Meara opined that apportionment was appropriate and

noted that a "corrected" prior impairment from her prior 07/02/07 injury is 16%, thus a 0% impairment remains after subtracting the 16% impairment from the 16% impairment from the 12/13/13 injury (Claimants' Exhibit 5, p. 116; Respondents' Exhibit B, p. 57).

26. The Respondents filed a Final Admission of Liability on December 18, 2014 for the December 13, 2013 injury admitting for 0% scheduled or whole person impairment and stating a position that denied liability for medical treatment or medications after MMI (Claimant's Exhibit 6, p. 120).

27. On January 6, 2015, the Claimant wrote to Dr. Bynam and asked for clarification on medical reports related to her July 1, 2007 and December 13, 2013 injuries. Specifically, the Claimant stated, "I know that I will most likely need a knee replacement in the future, along with other possible treatments, but since this injury involves 2 separate insurance companies, I am wondering which one I will need to pursue when it is time to consider these potential medical treatments. Could you please write me a letter stating what your view is on who should pay for future care regarding my right knee?" (Claimant's Exhibit 1, pp. 60-61). Dr. Bynam responded in writing on January 7, 2015, stating, "…in my opinion, I feel that [the Claimant] is likely to need total knee replacement in the future. Given her age she may need a revision and I do feel her initial work injury with surgery 04/2009 is the primary driver of this condition" (Claimant's Exhibit 1, p. 62; Respondents' Exhibit A, p. 50).

28. On January 12, 2015, the Division of Workers' Compensation sent the Respondents correspondence requesting an immediate response. Upon receipt of the December 18, 2015 Final Admission of Liability filed by the Respondents, the Division determined that additional documentation was required to support the position on MMI and/or permanent impairment pursuant to Rule 5-5(A). The Division requested that Respondents file an amended FAL within 20 days with documentation to establish the prior impairment or settlement award for the same body part when apportionment was at issue (Respondents' Exhibit L, p. 144).

29. On January 16, 2015, the Respondents filed a Final Admission of Liability for the December 13, 2013 injury admitting for 0% scheduled or whole person impairment and stating a position that denied liability for medical treatment or medications after MMI. This FAL was filed with Dr. O'Meara's impairment rating and evaluation of December 2, 2014 (Respondents' Exhibit L).

30. On February 2, 2015, the attorney for the Claimant sent written correspondence to the adjuster for the insurer on the July 1, 2007 claim advising them of the current claim related to the December 13, 2013 injury. Legal counsel references Dr. Bynam's January 7, 2015 letter opining that the Claimant's need for total knee arthroplasty surgery in the future is driven by the July 1, 2007 injury. However counsel also stated his opinion that the Claimant "has knee symptoms related to the newer December 13, 2013 work injury and is seeking to keep her medical benefits open on the newer claim, also." Insurer for the prior July 1, 2007 claim was invited to take part in

upcoming proceedings related to the December 13, 2013 claim (Respondents' Exhibit J).

31. Dr. Bynam testified by evidentiary deposition on April 23, 2015. Dr. Bynam testified that he is an orthopedic surgeon who treated the Claimant for two separate worker's compensation claims (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, pp. 3 and 5). Dr. Bynam testified the first injury occurred in 2007 and he first saw the Claimant on October 14, 2008 (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 5). Dr. Bynam's partner, Dr. Dwyer had performed arthroscopic surgery in 2008 on the Claimant's knee. Dr. Bynam performed arthroscopic surgery on the Claimant's knee in 2009. Dr. Bynam testified that there was evidence of arthritis in the knee as of his 2009 surgery that had developed since Dr. Dwyer's earlier surgery as evidenced by a difference in the status of her joint surface between the two surgeries (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 7). By the time Dr. Bynam saw the Claimant for treatment, the Claimant had developed narrowing of the joint space consistent with arthritis (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 9). Dr. Bynam testified that this arthritis was likely to lead to the need for a total knee replacement and this would be related to the 2007 injury (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 10). On cross-examination, Dr. Bynam agreed that he also treated the Claimant for an injury she sustained in December 2013 to the same knee as before (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 13). Dr. Bynam did not perform any surgery in connection with the December 2013 injury (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 14). Dr. Bynam testified that the primary driver for her anticipated need for total knee replacement surgery would relate back to the 2007 injury and resulting arthritic changes. He testified that the Claimant "regained her baseline level of function that existed prior to the more recent tibial plateau fracture" and so, having recovered from this more recent fracture, "treatment now is primarily due to the arthritic changes from the 2007 injury" (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 16).

32. On April 28, 2015, Dr. Patrick O'Meara testified by evidentiary deposition as an expert witness in family medicine with Level II accreditation as to workers' compensation matters (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 5). Dr. O'Meara testified that the Claimant was referred by the Claimant's designated provider for an impairment rating (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 6). He testified that he was given extensive medical records for this review, including records from the December 2013 injury as well as records from the prior July 2, 2007 injury along with some very old records regarding a knee surgery the Claimant had many years ago (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 7). Dr. O'Meara testified that the degenerative and arthritic changes in the Claimant's knee were advanced and well established by the time the Claimant was through the treatment for her 2007 injury and he attributes the degenerative changes to that prior 2007 injury (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp. 8-9). He opines that the impairment rating provided for the 2007 injury should have included a rating for the degenerative arthritis and that Dr. Krebs, who performed the impairment, overlooked that part of the Claimant's knee dysfunction (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp. 9-10). Dr. O'Meara

testified that in providing the Claimant's impairment rating, his understanding of the Colorado Division of Workers' Compensation Guidelines for performing impairment ratings requires him to establish everything that is impaired in the subject body part (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 11). He then completed and followed an algorithm for apportionment (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 11-12). Dr. O'Meara opined that his training for calculating impairments requires that "you do your impairment rating as an overall rating to get every – and try to get every bit of impairment possible; look at every dysfunction that the patient has, and put that into the rating." In this case, Dr. O'Meara noted all of the impairment related to arthritis that was "well-established and documented" for the Claimant's knee, to the point that a total knee arthroplasty was recommended at the time of the prior injury and rating for that injury. However, as Dr. O'Meara notes, the arthritis was not included in the prior rating, although, in his opinion, it should have been (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 13). In revisiting the Claimant's impairment rating for the 2007 injury, Dr. O'Meara opined that combining the ratings for the specific diagnoses of partial menisectomy and ACL repair and loss of motion with the addition of a rating for the arthritic condition and chondral loss, the result would be a 41% lower extremity rating which converts to a 16% whole person rating (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp.14-16). In looking at this issue in a different way, Dr. O'Meara agreed that, from a causation standpoint, the current injury involved a tibial plateau fracture that completely healed, and "all other dysfunction in the knee was preexisting (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 17). On cross-examination, Dr. O'Meara testified that what he was attempting to do was to reach a final impairment that accurately reflected the Claimant's ongoing impairment and to what injury he attributed the impairment. Ultimately, Dr. O'Meara testified that he found 0% of the Claimant's total impairment attributed to the December 2013 impairment (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 23). On redirect, Dr. O'Meara further testified that, per the Division worksheet, it is his understanding that he is to calculate the current total impairment, including prior impairment. Then, he is to attempt to reconcile his findings with the findings of prior physicians. This is what Dr. O'Meara testified that he was attempting to do with the manner in which he calculated and apportioned the Claimant's impairment (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp. 24-25).

33. Regardless of the terminology used in expressing medical opinions, the substantial weight of the evidence, including most persuasively the opinions of Dr. Bynam and Dr. O'Meara, establishes that the Claimant's December 13, 2013 work injury resulted in no permanent impairment to her right lower extremity. Rather, the Claimant fully healed from the December 13, 2013 non-displaced tibial plateau injury and returned to her baseline condition.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Permanent Partial Disability Benefits – Scheduled Injury – Causation/Relatedness

When an injury results in permanent medical impairment, and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section. C.R.S. §8-42-107(1). Where the scheduled injury causes the loss of, loss of use of, or partial loss of use of any member, the amount of permanent partial disability shall be the proportionate share of the amount stated in the schedule for the total loss of that member. C.R.S. §8-42-107(7)(b)(II).

The Claimant bears the burden of proof to establish that her scheduled injury is causally related to her work injury. When there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ has jurisdiction to resolve that dispute absent a Division IME. *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998). Per C.R.S. § 8-43-201, in any dispute arising under the Act, the Claimant bears burden of proving entitlement to benefits by a preponderance of the evidence.

The right to workers' compensation benefits arises only when an injured employee establishes by a preponderance of the evidence that an injury arises out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with

reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* Moreover, the weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Claimant appears to be arguing that the application of C.R.S. § 8-42-104(5)(a) supersedes the causation determination which is a threshold matter for entitlement to benefits. Because the prior impairment ratings for the Claimant's lower extremity for her 2007 injury did not include the rating for arthritis and degeneration that the treating and evaluating physicians all attribute to the Claimant's prior 2007 injury, Claimant argues that the rating for this impairment cannot be apportioned pursuant to the statute when considering the Claimant's total impairment situation as of the date she reached MMI for the 2013 work injury. Claimant argues that application of C.R.S. § 8-42-104(5)(a) and the Workers' Compensation Rules of Procedure and the Division-

promulgated Impairment Rating Tips preclude the rating physician in this case from retroactively adjusting the rating from the 2007 injury and then apportioning that adjusted impairment rating from the Claimant's current total impairment rating to reach the result that 0% impairment remains attributable to the 2013 work injury.

In considering the Claimant's argument, it is important to note that when interpreting statutes a court should give words and phrases in a statue their plain and ordinary meanings. Forced and subtle interpretations should be avoided. The statutory scheme should be construed to give consistent, harmonious and sensible effect to all of its parts. *Jones v. Industrial Claim Appeals Office,* 87 P.3d 259 (Colo. App. 2004); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). Statutes addressing the same subject matter should be construed together. *USF Distribution Services, Inc., v. Industrial Claim Appeals Office,* 111 P.3d 529 (Colo. App. 2005).

Respondents correctly argue that, in this case, the apportionment statute is not necessary for resolution where the Claimant has not met the threshold burden of establishing a causal relationship between her disabling condition and the work injury at issue. Respondents rely on a reasonable interpretation of C.R.S. § 8-42-104(5)(a), which provides, in pertinent part:

> In cases of permanent medical impairment, the employee's award or settlement shall be reduced:
>
> When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "Workers' Compensation Act of Colorado" or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

The Claimant makes the assumption that this is a case of "permanent medical impairment" and jumps forward into the remainder of the statute which sets forth the rule for calculating the deduction or apportionment due to a prior impairment rating. Yet, as Respondents argue, it cannot be merely assumed that a case is one of permanent medical impairment. For the statute to apply there must be a permanent medical impairment related to the current injury. Thus, the rating physician must first make a determination as to the causal relationship of any existing impairment to the work injury at issue. If the evidence supports a finding that the entirety of the Claimant's present disabling condition is the result of a preexisting injury rather than the current injury being rated, then the Claimant did not suffer any impairment or change in condition and there is not a permanent medical impairment attributable to the work injury that the rating physician is addressing. See, *Valdez v. Alstrom, Inc.,* W.C. No. 4-784-196 (ICAO October 18, 2012); *Trusty v. Big Lots Stores, Inc.,* W.C. No. 4-770-446 (ICAO March 25, 2011).

In this case, the Claimant sustained a slip and fall injury to her right knee on July 1, 2007. She subsequently underwent right knee surgery performed by Dr. Dwyer on January 16, 2008, after which the Claimant was reporting right knee ache and popping with no true instability but occasional hyperextension going down stairs. The Claimant then began treating with Dr. Bynum for the July 1, 2007 injury and, at this point, he noted that in the long term, the Claimant was looking at a total knee arthroplasty. Dr. Bynam treated the Claimant conservatively until the point that Claimant found it unacceptable to live with the current condition of her knee. Dr. Bynam recommended a right knee diagnostic arthroscopy with likely allograft ACL reconstruction and medial collateral ligament repair and he noted that this would help with stability and pain from instability but not the underlying arthritic aching. Dr. Bynam's opinion remained clear that the TKR is in the Claimant's long-term future even though the recommended arthroscopic surgery might forestall the knee replacement. On April 20, 2009, the Claimant underwent a right knee arthroscopic allograft tibialis anterior ACL reconstruction, partial medial menisectomy and chondroplasty of the patellar separate compartment. As of May 12, 2010, Dr. Bynam noted the Claimant had improved after Synvisc injections but her symptoms were not fully resolved. The Claimant reported no longer having the instability symptoms although she did have post menisectomy syndrome, postinjury arthritis and chondral changes. Dr. Bynam opined the Claimant was at MMI at this point, but again clearly opined that in the long term she would need future treatment related to the 2007 injury, including future steroid injections, possible therapy and total knee arthroplasty.

Dr. Caroline Gellrick performed a Division Independent Medical Examination (DIME) with an examination date of March 4, 2011 related to the Claimant's July 1, 2007 injury. Dr. Gellrick agreed with Dr. Bynam that the Claimant was at MMI for the right knee injury. Dr. Gellrick provided a lower right extremity rating of 22% (which would equate to a 9% whole person impairment rating) due to the lateral meniscus menisectomy, partial, medial meniscus menisectomy and ACL reconstruction, along with loss of range of motion. She did not provide an impairment rating for arthritis related to the 2007 injury although there was substantial documentation of the same in the medical records up to that point. The insurer for the 2007 injury filed a Final Admission of Liability for the July 1, 2007 injury on April 4, 2011 in accordance with Dr. Gellrick's DIME report admitting for a 22% scheduled impairment.

The Claimant unfortunately injured her right knee again on December 13, 2013 when she slipped and fell on ice outside of her workplace and fell on her right knee. The Claimant was able to get up and walk but experienced an immediate onset of pain. She was seen in the emergency room where an MRI was ordered. Dr. Bynam noted the MRI showed an effusion with an intact ACL reconstruction. Dr. Bynam also noted the MRI showed chondral wear and tear and some changes about her meniscus along with a nondisplaced lateral tibial plateau fracture. The Claimant treated with Drs. Tipping, Olson and Bynam for this new work injury. On August 19, 2014, Dr. James Lindberg performed a record and opined the Claimant had reached MMI and had no permanent impairment from this injury. He further opined that, the Claimant's "pre-existing arthritis and other issues predated these injuries" and "the non-displaced tibial plateau fracture

has no bearing on causing the need for a total knee replacement" rather this would result from the ACL surgery done after the 2007 injury. On October 20, 2014, the Claimant saw Dr. Bynam for follow up and, in discussing a record review report prepared by Dr. Lindberg dated August 19, 2014, Dr. Bynam concurred that the Claimant's "need for potential total knee in the future should be related to her primary ACL injury and meniscus injuries." In the treatment plan, Dr. Bynam agreed the Claimant was at MMI and that, although the Claimant may need future treatments, injections, therapy and potential knee replacement, opined "that should be directed back to her initial knee injury."

The Claimant saw Dr. Patrick O'Meara on December 2, 2013 for an impairment rating and placement at MMI for her December 13, 2013 injury. Dr. O'Meara concurred with Dr. Bynam that the Claimant was at MMI for the December 13, 2013 injury as of June 23, 2014. He noted that the Claimant had restrictions due to her knee dysfunction, but found this was "due to her prior degenerative changes, not due to her 12/13/13 tibial plateau fracture." Dr. O'Meara noted that the Claimant will need future medical care, including a likely total knee arthroplasty, but also states that "this was recommended before her placement at MMI for her 07/02/07 injury and was considered to be inevitable." Dr. O'Meara provided the Claimant with an impairment rating for her lower extremity for the specific disorders and range of motion deficits of 40% which would convert to a 16% whole person impairment. However Dr. O'Meara opined that apportionment was appropriate and noted that a "corrected" prior impairment from her prior 07/02/07 injury is 16%, thus a 0% impairment remains after subtracting the 16% impairment from the 16% impairment from the 12/13/13 injury. While Dr. O'Meara used the language of apportionment for his opinion, in essence, Dr. O'Meara was opining that none of the Claimant's right lower extremity condition at the time of MMI was causally related to the December 13, 2013 injury. Rather, based on his examination and the medical records, he found the entirety of the Claimant's right knee condition to be the result of her July 1, 2007 injury.

On January 6, 2015, the Claimant wrote to Dr. Bynam and asked for clarification on medical reports related to her July 1, 2007 and December 13, 2013 injuries. Specifically, the Claimant stated, "I know that I will most likely need a knee replacement in the future, along with other possible treatments, but since this injury involves 2 separate insurance companies, I am wondering which one I will need to pursue when it is time to consider these potential medical treatments. Could you please write me a letter stating what your view is on who should pay for future care regarding my right knee?" Dr. Bynam responded in writing on January 7, 2015, stating, "…in my opinion, I feel that [the Claimant] is likely to need total knee replacement in the future. Given her age she may need a revision and I do feel her initial work injury with surgery 04/2009 is the primary driver of this condition."

Dr. Bynam further clarified and elaborated on his opinion in testimony by deposition on April 23, 2015. Dr. Bynam's partner, Dr. Dwyer had performed arthroscopic surgery in 2008 on the Claimant's knee. Dr. Bynam performed arthroscopic surgery on the Claimant's knee in 2009. Dr. Bynam testified that there was evidence of

arthritis in the knee as of his 2009 surgery that had developed since Dr. Dwyer's earlier surgery as evidenced by a difference in the status of her joint surface between the two surgeries. By the time Dr. Bynam saw the Claimant for treatment, he found that the Claimant had developed narrowing of the joint space consistent with arthritis and he testified that this arthritis was likely to lead to the need for a total knee replacement and this would be related to the 2007 injury. Dr. Bynam testified that the primary driver for her anticipated need for total knee replacement surgery would related back to the 2007 injury and resulting arthritic changes. He testified that the Claimant "regained her baseline level of function that existed prior to the more recent tibial plateau fracture" and so, having recovered from this more recent fracture, "treatment now is primarily due to the arthritic changes from the 2007 injury."

In reliance upon the credible and persuasive opinions of Drs. Bynam and O'Meara, which are further supported by the weight of the medical records in this case, the ALJ found that the Claimant's December 13, 2013 work injury resulted in no permanent impairment to her right lower extremity. Rather, the Claimant fully healed from the December 13, 2013 non-displaced tibial plateau injury and returned to her baseline condition. The Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits for her right lower extremity in this claim because she has failed to establish that any impairment to her right lower extremity is causally related to the December 13, 2013 work injury. Thus, it is unnecessary to consider the issue of apportionment for resolution of this case.

Medical Maintenance Treatment after MMI

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

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart*

Stores, Inc., 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In this case, the Claimant has not met her burden of proof to establish that continuing care, up to, and including, but not limited to, total knee replacement surgery, is reasonable and necessary to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition. Per the persuasive and credible testimony of Dr. Bynam, the primary driver for the Claimant's anticipated need for total knee replacement surgery would related back to the 2007 injury and resulting arthritic changes. He further testified that the Claimant "regained her baseline level of function that existed prior to the more recent tibial plateau fracture" and so, having recovered from this more recent fracture, "treatment now is primarily due to the arthritic changes from the 2007 injury." In reliance upon the opinion of Dr. Bynam, to whom the Claimant herself defers on issues of medical treatment, it is found that any further treatment that the Claimant requires for her right lower extremity is unrelated to the December 2013 work injury. It is noted that Dr. Bynam's opinion is further supported by the credible and persuasive opinion of Dr. Lindberg, who is also an orthopedic surgeon, who opined that the future need for treatment of the Claimant's right knee relates back to the Claimant's 2007 work injury. The Claimant's claim for medical maintenance treatment after MMI for the December 2013 work injury is therefore denied and dismissed.

Remaining Issues – Penalty Claim

In light of the above findings and conclusions, any remaining issues, including the Claimant's claim for penalties, are moot. Respondents appropriately filed a Final Admission of Liability consistent with the medical report of Dr. O'Meara which determined that no permanent impairment was attributable to the December 2013 work injury.

C.R.S §8-43-304(1), as amended on August 11, 2010, provides that an insurer or self-insured employer who "violates any provision" of Articles 40 to 47 of Title 8 "or does any act prohibited thereby….for which no penalty has been specifically provided….shall . . . be punished by a fine of not more than one thousand dollars per day for each such offense." C.R.S. §8-43-304(1) further requires that the fine imposed is to be apportioned, in whole or in part, by the ALJ between the aggrieved party and the workers' compensation cash fund created in C.R.S §8-44-112(7)(a), except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed. Section 3 of Chapter 287, Session Laws of Colorado 2010 provides that the amendment "applies to conduct occurring on or after August 11, 2010."

The failure to comply with the Workers' Compensation Rules of Procedure has been determined to constitute a failure to perform a "duty lawfully enjoined" within the meaning of C.R.S. §8-43-304(1). *Paint Connection Plus v. Industrial Claim Appeals* Office, 240 P.3d 429 (Colo. App. 2010); Diversified *Veterans Corporation Center v. Hewuse,* 942 P.2d. 1312 (Colo. App. 1997).

Before penalties may be imposed under §8-43-304(1), an ALJ must apply a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of the Act, or of a duty lawfully enjoined, or of an order. If the ALJ concludes that there is such violation, the ALJ shall impose penalties if the second factor is also met, that the insurer's actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals* Office, 68 P.3d 601 (Colo. App. 2003); Allison *v. Indus. Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995).

In this case, the Claimant has failed to establish that the Respondents' conduct constituted a violation of the Act, of a duty that Respondents' owed or of an order. There was no duty to admit for an impairment rating for a condition that the rating physician found to be causally unrelated to the December 2013 injury. Nor did the Claimant prove a violation of the Act, as it was found that the apportionment statute was not applicable in the resolution of this case where the Claimant failed to establish that any permanent medical impairment was attributable to the December 2013 work injury. Therefore, the Claimants claim for penalties is denied and dismissed.

ORDER

It is therefore ordered that:

1. The Claimant bears the burden of proof to establish that conditions for which she seeks benefits are causally related to the work injury. The Claimant has not met her burden of proof to establish that her arthritis condition was caused by, aggravated by, or accelerated by her December 13, 2013 work injury. The Claimant is not entitled to benefits in this case related to the arthritis and degenerative changes in her right knee as no part of the Claimant's condition is causally related to the Claimant's December 13, 2013 work injury. The Claimant's claim for permanent partial disability benefits for her December 13, 2013 work injury is denied and dismissed.

2. The Claimant has failed to meet her burden of proof regarding maintenance medical treatment. Ongoing treatment, including, but not limited to, total knee replacement surgery, is not related and is not reasonable and necessary to cure and relieve the of the Claimant's December 13, 2013 industrial injury or to prevent further deterioration of any condition related to that injury. The claim for ongoing medical benefits for surgery or other treatment for the Claimant's right lower extremity is denied and dismissed.

3. The Claimant's claim for penalties is denied and dismissed.

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

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

DATED: October 8, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-971-057-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 23, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/23/15, Courtroom 3, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 10 and 12 were admitted into evidence without objection. Claimant's Exhibit 11, Bates page 182 was admitted without objection. The remainder of Claimant's Exhibit 11 was withdrawn after an Objection by Respondents' counsel. Respondents' Exhibits A through I (as in Isaac) were admitted into evidence without objection. The evidentiary deposition of Timothy O'Brien, M.D., was admitted in lieu of his live testimony.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on October 2, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable right shoulder injury on September 27, 2014. If so, was the surgery performed by William P. Cooney, M.D., causally related and reasonably necessary.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues designated for hearing.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant, now 41 years old, is a registered nurse (RN), who works in the Intensive Care Unit (ICU) at the Employer's hospital. She has been employed in that capacity since 2004. On September 27, 2014, one of her ICU patients attempted to extubate himself while he was being weaned off essential medications. While the patient had been sedated and was resting quietly on a hospital bed, he awoke suddenly and immediately began attempting to remove an endotracheal tube. Removal of the tube endangered the patient's life, and the Claimant engaged in a protracted struggle with the patient to prevent extubation.

2. The patient was male, weighed roughly 175 pounds and appeared to be in his early sixties. While the patient had been placed in wrist restraints, his legs were free. During the course of the struggle, the patient repeatedly attempted to grab and remove the tube. He rolled back and forth on the bed as he attempted to bring the tube within reach of his restrained arms. He sat up repeatedly. He kicked and hit the Claimant and was in general violently combative.

3. The Claimant, who was 40 at the time, "fought with" the patient for roughly three to five minutes before two co-employees, Dea Carranco and Lynda Garcia, arrived to help the Claimant. It took all three employees to subdue the patient. During the course of the struggle, the Claimant moved back and forth alongside the patient's bed. At times, she had to hold down his legs and at other times she had to hold his arms and upper-body. She had to lean over the patient repeatedly during the struggle. She used both her arms and her upper body to gain leverage and to put pressure on the patient so that he would return the prone position he had been in before he awoke. Finally, at various times, the Claimant arms were extended away from her body in such

a manner that her arms and hands would be above her head had she been standing erect. The Claimant's testimony concerning the struggle is undisputed and it is credible. Her testimony was also corroborated by witness statements introduced as Claimant's Exhibit 12.

4. Within 24 hours, the Claimant felt some soreness in approximately the same area of her right shoulder where she had been kicked by the patient. She initially attributed the soreness to being kicked during the struggle.

5. September 27, 2014 was a Saturday. At some point during the week of September 28, 2014, the Claimant mentioned the shoulder soreness to her supervisor, Kristy L. Murphy (See Claimant's Exhibit No. 11, Bates No. page No 182). On October 7, 2014, the Claimant filled out an "Associate Event" report, formally reporting that she had sustained an injury to her right shoulder during the struggle. The Claimant sought medical treatment on October 24, 2014.

<u>In-House Medical Treatment</u>

6. The Employer maintains an in-house clinic for the treatment of its injured workers. Cathy Stringer is a RN who works in that clinic. Stringer referred the Claimant to physical therapy (PT) and for an evaluation with William Woo, M.D., who also works in the clinic. Dr. Woo examined the Claimant and referred her for an MRI (magnetic resonance imaging) of the right shoulder. The MRI was read as being negative. Dr. Woo also referred the Claimant to Nicholas K. Olsen, D.O., a physiatrist, and William Ciccone II, M.D., an orthopedic surgeon. Dr. Ciccone examined the Claimant, injected her right shoulder and ultimately recommended that she undergo exploratory arthroscopic surgery. Because the MRI had been read as negative, Dr. Woo and Dr. Olsen believed that the Claimant should treat the shoulder injury with therapy and medications. Dr. Woo also referred the Claimant to Dr. Cooney, an orthopedic surgeon, for a second opinion. Dr. Cooney examined the Claimant, injected her shoulder a second time and ultimately recommended surgery. The Claimant's early diagnoses included shoulder strain and impingement.

7. While the Claimant was being seen and examined by the above-mentioned physicians, she was also undergoing PT and taking medication to treat her right shoulder. Her symptoms worsened over time. The Claimant received temporary relief from the injections performed by Dr. Ciccone and Dr. Cooney. Because she was not satisfied with the care she was receiving from Dr. Woo and because Dr. Woo did not want the Claimant to undergo surgery, the Claimant requested a change of physician. By agreement with the Respondent, the Claimant's care was transferred to Sander Orent, M.D. Dr. Orent agreed with Dr. Ciccone and Dr. Cooney that the Claimant needed surgery.

8. Ultimately, Dr. Cooney requested authorization for surgery. The request for authorization was denied. By that time, the Respondent had also filed a Notice of Contest. Because her condition had continued to worsen, the Claimant elected to go forward with surgery on her own.

The Claimant's Medical Condition

9. The Claimant had been diagnosed with impingement syndrome by numerous physicians and Dr. Cooney and Dr. Ciccone believed it was necessary to perform surgery despite the allegedly negative MRI. Dr. Cooney performed surgery on Claimant's right shoulder in April 2015. During the course of the procedure, Dr. Cooney identified substantive pathology in the Claimant's shoulder including, but not limited to:

> (1) "… high grade partial thickness tearing and fraying throughout the distal portion of the intra articular aspect" of the Claimant's biceps; and (2) a "… longitudinal split in the *mid to posterior aspect of the supraspinatus."*

In addition to repairing the tears, Dr. Cooney performed a sub-acromial decompression to treat the impingement syndrome.

The Claimant

10. After the injury, despite being symptomatic, the Claimant continued working for a few months without restrictions. After the surgery, the Claimant missed work for a few months, but eventually returned to work with restrictions. As of the hearing date, the Claimant had been released by Dr. Cooney and had returned to work full time and at full duty. According to the Claimant, her pre-surgery symptoms have improved dramatically since the surgery.

11. The Claimant continued working after the injury because she had to support her family, despite the fact that she was having pain in her right shoulder and despite the fact that her condition was gradually worsening. She remained symptomatic when she returned to work after the surgery, but she returned to work again because she had to support her family. The Claimant's testimony is undisputed, persuasive and highly credible.

Telephonic Evidentiary Deposition of Timothy O'Brien, M.D.—Respondent's Independent Medical Examiner (IME)

12. The Respondent retained Dr. O'Brien to perform an IME. Dr. O'Brien issued a report that was submitted into evidence and he testified by telephonic evidentiary deposition. Dr. O'Brien was of the opinion: (1) that the Claimant sustained nothing more than a contusion during the struggle with the patient; and (2) that tears

identified during surgery were “normal” and “age-related.” On cross-examination, however, Dr. O’Brien conceded that he did not have any literature to support the claim that the tears were either “normal” or “age related” for a forty year old woman.

13. Dr. O’Brien also was of the opinion that – at least according to his understanding – the Claimant’s right shoulder was never placed in what he called “the impingement zone” during the struggle and that a direct, frontal blow to the shoulder from a kick cannot cause rotator cuff tearing unless a person’s arm/should is in the “impingement zone” when the blow lands. Further, it was Dr. O’Brien’s opinion that the Claimant had not suffered “true” rotator cuff tears.

14. Dr. O’Brien was asked if the Claimant could have injured her shoulder and suffered the rotator cuff tears during the struggle, even if she wasn’t injured – and didn’t she suffer rotator cuff tears – when she was kicked. Dr. O’Brien’s answer was evasive. He noted that he had asked the Claimant if she had struggled with other patients without injuring herself. When she noted that she had engaged in other struggles without injuring herself, his analysis of that possibility concluded further inquiry.

15. Dr. O’Brien was of the opinion that Claimant’s post-struggle “behavior” proved that she hadn’t been injured. According to Dr. O’Brien, because the Claimant didn’t report the injury for two weeks, because she didn’t have severe pain at the time of the struggle and because she continued working, the Claimant could not have sustained anything more than a contusion (As noted previously, the Claimant reported her injury to her supervisor, Kristy Murphy, within a week). Dr. O’Brien’s inaccurate history regarding the reporting of the injury makes his recounting of the history suspect and impacts his credibility in a negative sense.

16. In his report, Dr. O’Brien agreed that it was reasonable for Dr. Cooney to perform the surgery on Claimant’s shoulder, however, he implies that the need for the surgery was not causally related to the incident in question. Underlying this opinion is Dr. O’Brien’s discredited opinion (by the ALJ) that the need for the surgery was “age-related.”

17. Dr. Cooney reviewed Dr. O’Brien’s report. Dr. Cooney disagreed with Dr.O’Brien’s opinions and analysis. With respect to the issue of the struggle with the patient – even if not when kicked -- Dr. Cooney had this to say:

> “To be very clear, I believe that Dr. Obrien’s (*sic*) opinion regarding causation is not accurate. Again, as stated above, [Claimant] clearly is not capable of determining how her shoulder was injured during a combative struggle with a patient. The fact that she reports having been kicked and then Dr. Obrien’s focus on this kick rather than the restraining of the patient and ignoring the restraining of the patient as being perhaps potential causation for this is

> **disingenuous** (emphasis supplied)…" (Claimant's Exhibit 4, Bates No. 78.)

18. Dr. Cooney's opinion concerning causation was summarized as follows:

> The patient clearly states that the arm was sore the day following this event and in light of her not having had any prior shoulder injury, it seems in my opinion to be absolutely clear, that this work related event (whether it was wrestling, kicking or a combination of the two), is solely responsible for the ultimate findings that were identified at the time of the surger." (Claimant's Exhibit 4, Bates No. 77.)

Dr. Cooney's opinions concerning the issue of causation are considerably more thorough, persuasive and credible than the opinions of Dr. O'Brien.

Sander Orent, M.D.

19. Dr. Orent reviewed Dr. O'Brien's report and deposition testimony. Dr. Orent disagreed with Dr. O'Brien's opinions concerning causation. Dr. Orent testified that, in his opinion, the tears in the Claimant's shoulder were neither "normal" nor "age-related" for a forty year old woman, like the Claimant. Dr. Orent is of the opinion that the tears in the Claimant's shoulder are related to the struggle with the patient. He further is of the opinion that the Claimant developed impingement syndrome is a result of the struggle; that a "negative" MRI proves nothing about the existence of pathology because they MRIs are fallible; that the surgery performed by Dr. Cooney was reasonably necessary and comported with the Medical Treatment Guidelines (MTG) [found under Division of Workers' Compensation (DOWC) Rules of procedure (WCRP), Rule 17, Exhibit 5, 7 CCR 1101-3; that any degeneration of the tears in the Claimant's shoulder had occurred between the time she was injured and the date of surgery and that the worsening of Claimant's symptoms was in part attributable to the fact that the Claimant continued working. Dr. Orent's opinions concerning causation are considerably more persuasive and credible than the opinions of of Dr. O'Brien.

20. The Claimant has seen a chiropractor on and off for many years. She was involved in an automobile accident in March of 2014 and treated with her chiropractor for a whiplash injury sustained in that accident. Claimant testified that she did have some stiffness in the upper back which radiated out towards her shoulders, bilaterally. Dr. O'Brien interpreted the chiropractic records as proof that the Claimant may have had a chronic right shoulder condition. The ALJ interprets Dr. O'Brien's "rush to judgment" on this history as an easy substitute for further medical pursuit and therefore lacking in persuasiveness and credibility. Dr. Orent reviewed the chiropractic records and rendered the following opinion:

> (1) that they do not include symptoms consistent with the injury – impingement syndrome and rotator cuff tears -- Claimant sustained on September 27, 2014; and (2) that the records of treatment after the March, 2014 automobile accident demonstrate only that Claimant has symptoms in the area of her thoracic spine.

With respect to the issue of whether the Claimant suffered from any chronic, pre-existing condition in her right shoulder, Dr. Orent's opinions are far more credible than the opinions of Dr. O'Brien.

Ultimate Findings

21. For the reasons detailed herein above, the ALJ finds the opinions of Dr. Ciccone, Dr. Cooney and Dr. Orent on compensability, the causal relatedness of the Claimant's need for the right shoulder surgery and the reasonable necessity thereof, are more persuasive and credible than the opinions of Dr. O'Brien. Indeed, the ALJ finds the opinions of Dr. O'Brien significantly lacking in credibility. Further, the ALJ finds the Claimant's testimony credible and undisputed.

22. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Ciccone, Dr. Cooney and Dr, Orent and to reject the opinions of Dr. O'Brien.

23. The Claimant sustained a compensable injury to her right shoulder on September 27, 2014, arising out of the course and scope of her employment for the Employer herein.

24. The right shoulder surgery, performed by Dr. Cooney, was causally related to the compensable right shoulder injury of September 27, 2014; and, it was reasonably necessary to cure and relieve the effects of that injury.

25. The Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on September 27, 2014, arising out of the course and scope of her employment for the Employer herein.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible and undisputed. As further found, the opinions of Dr. Ciccone, Dr. Cooney and Dr. Orent on compensability, the causal relatedness of the Claimant's need for the right shoulder surgery and the reasonable necessity thereof were more persuasive and credible than the opinions of Dr. O'Brien. Indeed, as found, the opinions of Dr. O'Brien were significantly lacking in credibility.

Substantial Evidence

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

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant established that her right shoulder injury occurred during the course and scope of her employment on September 27, 2014.

Medical

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment for her right shoulder is causally related to a patient kicking her and her bodily maneuvers

to subdue the patient on September 27, 2014 Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of her injury.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay all of the costs of medical care and treatment for the Claimant's compensable right shoulder injury, including the costs of surgery performed by William P Cooney, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

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

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

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease in the form of bilateral Carpal Tunnel Syndrome (CTS) during the course and scope of her employment with Employer.

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

3. Whether Claimant's claim is barred by the two year statute of limitations delineated in §8-43-103(2), C.R.S.

FINDINGS OF FACT

1. Claimant is a 55 year old female who worked for Employer as a Loan Assistant II. Her job duties involved a variety of tasks including the attending meetings, ordering reports, speaking on the telephone and using a keyboard and mouse. Claimant's job duties specifically included the following: (1) keyboarding/writing/pinching for 34-66% of the time or two and one-half to five hours per day; (2) handling for 1-33% of the time or up to two and one-half hours per day; (3) standing/walking for 1-33% of the time or up to two and one-half hours per day; and (4) talking on the telephone for 24-66% of the time or two and one-half to five hours per day. Claimant was not exposed to extreme temperatures or vibratory tools while working for Employer.

2. Claimant asserted that on March 3, 2014 she sustained wrist and neck injuries as a result of repetitive motion while performing her job duties for Employer. She visited private physician Richard Glassman, D.O. for an examination. Claimant reported that she had been suffering from bilateral arm pain for the previous three to four months. She also noted "general achiness from the wrist up the forearms up the arms and sometimes down both axillae and down the lateral chest." Dr. Glassman suspected "tendinitis and/or repetitive motion syndrome." However, he doubted that Claimant clinically suffered from CTS.

3. The medical records reveal that Claimant continued to report recurrent neck and arm pain. She underwent extensive physical therapy

4. On October 24, 2014 Claimant visited Alireza T. Alijani, M.D. for an evaluation. She reported moderate to severe numbness, paresthesias and pain in both hands. The numbness was localized to the palm, thumb and index finger. Dr. Alijani

diagnosed Claimant with bilateral CTS. He also referred Claimant for an EMG to rule out peripheral neuropathy and cervical radiculopathy.

5. On November 24, 2014 Claimant returned to Dr. Alijani for an evaluation. After reviewing the EMG results and performing a physical examination, Dr. Alijani determined that Claimant was a candidate for a carpal tunnel release. However, Dr. Alijani noted that Claimant did not exhibit clinical findings of CTS.

6. Dr. Alijani referred Claimant to Usama Ghazi, D.O. for an examination. On January 6, 2015 Claimant visited Dr. Ghazi. Dr. Ghazi determined that the EMG revealed bilateral CTS. However, he remarked that there were no symptomatic findings of CTS on examination and Claimant exhibited an intact medial nerve.

7. On January 15, 2015 Allison M. Fall, M.D. conducted a medical records review of Claimant's condition. She determined that Claimant did not suffer any injuries that were caused by her job duties for Employer. Dr. Fall explained that Claimant had undergone physical therapy and her lateral epicondylitis had resolved. Claimant's cervical strain was related to her May 9, 2012 motor vehicle accident. Dr. Fall remarked that Claimant did not demonstrate physical examination findings consistent with CTS. She summarized that the "mild slowing of the median nerve on electrodiagnostic testing [was] more likely related to her underlying thyroid disease, but it [was] not consistent with her symptomatology. Accordingly, Dr. Fall did not recommend additional medical treatment.

8. On March 11, 2015 Claimant visited Thomas Fry, M.D. for an examination. Claimant reported bilateral hand pain and swelling. She noted that she began developing intermittent symptoms in 2010 and 2011 when her work duties significantly increased. Dr. Fry commented that Claimant's EMG reflected mild changes consistent with CTS. He summarized that Claimant exhibited relatively minimal findings on physical examination, somewhat diffuse historical findings and mild electrical changes. Dr. Fry thus recommended a trial of right-sided carpal tunnel injections.

9. On August 27, 2015 the parties conducted the evidentiary deposition of Dr. Fall. Dr. Fall testified that she relied on the *Division of Workers' Compensation Medical Treatment Guidelines (Guidelines)* in performing a causation analysis. She explained that in order to perform a medical causation assessment for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis. The next step is to evaluate causation of the diagnosis, including defining the job duties, and identifying whether any of the duties meet the delineated risk factors in the *Guidelines*. Dr. Fall concluded that there was no causal connection between Claimant's job duties and her symptoms or diagnosis. She commented that none of Claimant's treating physicians had utilized the *Guidelines* to perform a causation analysis.

10. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward

Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

11. Claimant has failed to establish that it is more probably true than not that she sustained a compensable occupational disease in the form of bilateral CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Loan Assistant II while working for Employer caused her to develop CTS in both upper extremities. However, relying on the *Guidelines,* Dr. Fall persuasively determined that Claimant's duties while working for Employer failed to meet the causational requirements for CTS outlined in the *Guidelines.* She remarked that Claimant did not demonstrate physical examination findings consistent with CTS. Dr. Fall summarized that the mild slowing of the median nerve was more likely related to her underlying thyroid disease. She commented that none of Claimant's treating physicians had utilized the *Guidelines* to perform a causation analysis.

12. The record reveals that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5 of the *Guidelines*. Claimant's job duties specifically included the following: (1) keyboarding/writing/pinching for 34-66% of the time or two and one-half to five hours per day; (2) handling for 1-33% of the time or up to two and one-half hours per day; (3) standing/walking for 1-33% of the time or up to two and one-half hours per day; and (4) talking on the telephone for 24-66% of the time or two and one-half to five hours per day. She was not exposed to extreme temperatures or vibratory tools while working for Employer. The preceding job duties do not meet the primary or secondary risk factors as outlined in the *Guidelines*. The *Guidelines* specify activities including computer work, using handheld vibratory power tools, working in cold environments, a combination of force and repetition (e.g. six hours of graded and 50% of individual maximum force with task cycles of 30 seconds or less), use of handheld tools weighing two pounds or greater and awkward posture and duration. Repetition alone is not a risk factor for CTS and there must be a proven combination of repetition, force and cycle time in order to meet the causational requirements. Claimant's job activities did not meet the minimum thresholds for force, repetition or duration to establish an occupational disease pursuant to the *Guidelines*. Accordingly, Claimant has failed to demonstrated that the hazards of employment caused, intensified, or, to a reasonable degree, aggravated her upper extremity conditions.

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. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to

development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable occupational disease in the form of bilateral CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Loan Assistant II while working for Employer caused her to develop CTS in both upper extremities. However, relying on the *Guidelines,* Dr. Fall persuasively determined that Claimant's duties while working for Employer failed to meet the causational requirements for CTS outlined in the *Guidelines.* She remarked that Claimant did not demonstrate physical examination findings consistent with CTS. Dr. Fall summarized that the mild slowing of the median nerve was more likely related to her underlying thyroid disease. She commented that none of Claimant's treating physicians had utilized the *Guidelines* to perform a causation analysis.

9. As found, the record reveals that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5 of the *Guidelines*. Claimant's job duties specifically included the following: (1) keyboarding/writing/pinching for 34-66% of the time or two and one-half to five hours per day; (2) handling for 1-33% of the time or up to two and one-half hours per day; (3) standing/walking for 1-33% of the time or up to two and one-half hours per day; and (4) talking on the telephone for 24-66% of the time or two and one-half to five hours per

day. She was not exposed to extreme temperatures or vibratory tools while working for Employer. The preceding job duties do not meet the primary or secondary risk factors as outlined in the *Guidelines*. The *Guidelines* specify activities including computer work, using handheld vibratory power tools, working in cold environments, a combination of force and repetition (e.g. six hours of graded and 50% of individual maximum force with task cycles of 30 seconds or less), use of handheld tools weighing two pounds or greater and awkward posture and duration. Repetition alone is not a risk factor for CTS and there must be a proven combination of repetition, force and cycle time in order to meet the causational requirements. Claimant's job activities did not meet the minimum thresholds for force, repetition or duration to establish an occupational disease pursuant to the *Guidelines*. Accordingly, Claimant has failed to demonstrated that the hazards of employment caused, intensified, or, to a reasonable degree, aggravated her upper extremity conditions.

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 30, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

#JU3PCO120D11BJv 2

1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues determined by this decision involve Claimant's entitlement to death benefits, as a dependent surviving spouse, following the death of her husband on August 30, 2014. There is no question raised as to Claimant's dependency status; rather the dispute involves a question of compensability. The specific question to be answered is:

I. Whether Claimant has proven by a preponderance of the evidence that Esquiel Montoya's death on August 30, 2014, was related to pulmonary fibrosis which was caused by an occupational exposure to wood and Corian dust over the years while working as a cabinet and countertop installer.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr.'s Storms and Jacobs, the ALJ enters the following findings of fact:

1. The decedent had a history of breathing difficulties dating back to 1970 when, according to his personal physician James E. Edwards, M.D., he was first treated for asthma symptoms. In 1978, Dr. Edwards referred claimant to Dr. Blakely for treatment of asthma. (Resp. Ex. M, pg. 435) Dr. Blakely, ultimately referred Mr. Montoya to Dr. William Storms for treatment in 1978. Dr. Storms, an allergy and asthma specialist, diagnosed claimant with mixed asthma and idiopathic pulmonary fibrosis in 1978.

2. Mr. Montoya made a claim for a compensable injury on February 27, 1984. On July 1, 1985 an ALJ found the claim compensable. In determining that the claim was compensable, the ALJ noted, "… the claimant sustained an admitted compensable injury on February 27, 1984 as a result of inhaling dust particles while cutting counter parts, which exposure resulted in an aggravation of a preexisting condition diagnosed as asthma…. Medical opinions of Dr. Repsher and Dr. Storms support the claim for compensation and medical benefits based upon work exposure to dust resulting in an aggravation of a preexisting condition, namely, asthma". Claimant's Exhibit 2, page 2 (hereinafter C's Ex.2 p.2)

3. On November 11, 1988 a hearing was convened regarding Mr. Montoya's entitlement to permanent total disability (PTD) benefits secondary to the debilitating effects of his proven occupational asthma. ALJ Cullen Wheelock determined that Mr. Montoya was permanently totally disabled and in so doing relied, in part, upon the following medical statement of Dr. William W. Storms:

> ". . . because of his chronic asthmatic lung disease, I feel that He is not suitable for gainful employment. This is based not only Upon his respiratory impairment and his lack of ability to work because of this, but also because of the fact that he would have many sick days due to his asthma, and would be out of work a large percentage of the time" C's Ex.3 p.5.

4. The order issued by ALJ Wheelock following Mr. Montoya's PTD hearing references a sole occupational disease, namely aggravation of pre-existing asthma, as the basis for Mr. Montoya's inability to work. Based upon the evidence presented, the undersigned ALJ finds that Mr. Montoya never alleged, and his medical providers never opined, that his previously diagnosed pulmonary fibrosis was due to his work. Nor did Mr. Montoya allege that he worked with countertops containing Corian. Rather, the evidence submitted reflects that that he was exposed to and inhaled wood and Formica countertop dust. There was never any decision, order, or admission that his idiopathic pulmonary fibrosis was caused by, aggravated by, or involved in the claim for PTD benefits despite its known existence based upon Dr. Storms' diagnosis in 1978.

5. Mr. Montoya received permanent total disability benefits from November 18, 1988 until his death on August 30, 2014. C's Ex.1 p.1.

6. Mr. Montoya's Certificate of Death indicates that the immediate cause of death was "due to or as a consequence of Pulmonary Fibrosis with 50 years plus of interval between onset and death. Other significant conditions listed as contributing but not related to the immediate cause included CHF (congestive heart failure), and asthma. No autopsy was done C's Ex.1 p.1 l.33.

7. Respondents submitted additional medical evidence, including the testimony of Dr's Schwartz and Jacob, suggesting that Mr. Montoya's pulmonary fibrosis was likely present while he was serving in the United States' military during the 1950s. Claimant had a chest x-ray in 1952 that he was told was abnormal. He was rejected for employment at the steel mill in Pueblo in the 1950s after a physical which included a chest x-ray demonstrated pathology in the lungs. A chest x-ray done in June 1951 revealed, "Fibro-calcific scarring in the right apex, probably due to old healed chronic pulmonary inflammatory disease." A chest x-ray preformed during a hospitalization on April 2, 1954, showed old parenchymal lesions with plural reactions. On June 11, 1954, a negative of a chest x-ray was found to show calcific densities in the right apex and the right first interspace and blunting of the left costophrenic angle. (Clt's Ex. 22, pgs. 58-60; Resp. Ex. C, pgs. 108-109) In 2012, Mr. Montoya pursued medical benefits for his idiopathic pulmonary fibrosis from the Veterans' Administration, alleging that this disease arose in and due to his military service. Mrs. Montoya sought Dr. Storms' help with that application and allegation (Resp. Ex. C, pg. 191), and reported that claimant had succeeded and that the Veterans' Administration would provide benefits as claimant's pulmonary fibrosis was due to his military service (Resp. Ex. C, pg. 96).

8. Dr. Storms was Mr. Montoya's primary authorized treating physician under the

occupational asthma claim. Dr. Storms is board certified in internal medicine and is an expert in allergy/immunology medicine. He was qualified as an expert in pulmonary medicine (Storms Deposition, p.6 ll.10-20). Nonetheless, Dr. Storms admitted during his deposition testimony that he is not accredited as a Level II provider. He testified that he does not treat pulmonary fibrosis, instead referring patients including Mr. Montoya to pulmonary specialists for evaluation, diagnosis and treatment of that disease. Dr. Storms does not hold himself out as, or consider himself an expert in, pulmonary fibrosis. Dr. Storms testified he did not have any knowledge of any lung disease or exposures to lung disease causing illnesses or environments during Mr. Montoya's military service, or any knowledge of his chest and lung x-rays in the 1950s while in the military. He did not know Mr. Montoya had applied for work in a steel mill, or any additional detail about his occupational history. He did not know what materials and wood products Mr. Montoya worked with while he performed work as a cabinet/countertop installer. He did not know whether Mr. Montoya wore a mask while working installing cabinets/countertops, what type of mask he wore, and how often he wore that mask while working. Dr. Storms was apparently unaware that he diagnosed Mr. Montoya with idiopathic pulmonary fibrosis when he began treating him in 1978, testifying that the diagnosis was made in 2003 while Mr. Montoya was evaluated for lung problems at National Jewish Hospital.

9. Dr. William Storms opined during his deposition testimony Mr. Montoya's death was not due to or in any way related to his asthma (Storms Deposition, p. 76: 13-16). This comports with the opinions of Dr. Schwartz, and Dr. Jacobs. All agree that Mr. Montoya's death was caused by his pulmonary fibrosis. Regarding the cause of Mr. Montoya's pulmonary fibrosis Dr. Storms opined that the progressive scarring in Mr. Montoya's lungs leading to interstitial lung disease (pulmonary fibrosis) was caused by his occupational exposure to wood and Corian dust and was not idiopathic as has been reported by Dr. Schwartz and Dr. Jacobs. In support of this conclusion, Dr. Storms cites several medical articles which he testified supports a causal connection between Mr. Montoya's exposure to wood and Corian dust and his interstitial lung disease, in addition to Mr. Montoya having a history, physical findings, and progression of disease that fits occupationally-induced pulmonary fibrosis. Dr. Storms' opinion that Mr. Montoya suffered from occupationally-induced pulmonary fibrosis is inconsistent with and contradictory to his prior diagnosis made in 1978 that Mr. Montoya had idiopathic pulmonary fibrosis.

10. No other medical provider who evaluated Mr. Montoya, treated Mr. Montoya, reviewed his medical records, or performed a medical evaluation or IME in this claim concluded his pulmonary fibrosis was due to or related to his work as a cabinet/countertop installer. Instead, they uniformly concluded claimant's pulmonary fibrosis was idiopathic. Dr. Schwartz stated that Mr. Montoya's pulmonary fibrosis was not related to any work condition and therefore his death was not due to his work related condition. C's Ex.20 pp.50-51. Dr. Jacobs stated that Mr. Montoya's respiratory problems were never related to an industrial or work pathogen but related to his progressive idiopathic pulmonary fibrosis. C's Ex.21 p.57. Similarly, after extensive studies, evaluations, and investigation, Mr. Montoya's pulmonary fibrosis was deemed

idiopathic, and not due to any workplace exposure, by his providers at National Jewish Hospital. This was after occupational exposure was considered as a differential diagnosis, but rejected as an actual diagnosis for Mr. Montoya's pulmonary fibrosis. Finally, the reports from a reviewer through the Veterans' Administration also concluded Mr. Montoya's pulmonary fibrosis was idiopathic. (Resp. Ex. C, pg. 124) As that reviewer wrote, and as Dr. Jacobs and Dr. Schwartz testified, the cause of idiopathic pulmonary fibrosis in not known and is not caused by any known exposure or event Mr. Montoya received during his lifetime, and work for employer.

11. Based upon careful review of the articles submitted, the ALJ finds that they do not stand for the proposition that there is a verifiable link between exposure to wood and Corian dust and pulmonary fibrosis as suggested by Dr. Storms. Rather, the articles merely raise the possibility that working with wood and having exposure to Aluminum Trihydrate may be risk factors for the development of pulmonary fibrosis. While the undersigned agrees with the comments provided in the articles that providers "should consider occupational exposures in any new patient with ILD without an obvious cause and certainly before defining an individual patient's disease as idiopathic" and that the diagnosis of Idiopathic Pulmonary Fibrosis is one of exclusion of other known causes[1], the ALJ credits the testimony of Dr's. Schwartz and Jacobs, to find that these general principals do not substantiate a causal link between exposure to wood and Corian dust and the development of pulmonary fibrosis. In the absence of additional persuasive evidence, the ALJ finds Dr. Storms' testimony that Mr. Montoya's pulmonary fibrosis was caused by exposure to wood and Corian dust speculative.

12. Based upon the evidence presented, the ALJ finds that at the time his death Mr. Montoya suffered from two separate and distinct medical conditions, specifically asthma and secondly, interstitial lung disease (pulmonary fibrosis). A preponderance of the persuasive evidence supports that his pulmonary fibrosis was likely idiopathic and unrelated to his occupation as a cabinet and countertop installer. In this case the convincing evidence demonstrates that Mr. Montoya, more probably than not, demonstrated the first radiographic signs of pulmonary fibrosis in the 1950's while in the military long before his work as a cabinet/countertop installer. As is consistent with progressive nature of idiopathic pulmonary fibrosis, Mr. Montoya's lung function continued to deteriorate over time despite not working in the more than 26 years before his death.

13. Based upon the evidence presented, the ALJ finds that Dr. Storms lacks the knowledge, expertise, or understanding of Mr. Montoya's medical and occupational history to provide a persuasive opinion on whether Mr. Montoya's death on August 30, 2014, was related to pulmonary fibrosis which was caused by an occupational exposure to wood and Corian dust over the years while working as a cabinet and countertop

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[1] See *Occupational Interstitial Lung Disease*, Clinics in Chest Medicine, Vol. 25 (2005), pp. 467-478 and The American Thoracic Society Documents entitled An Official ATS/ERS/JRS/ALAT Statement: *Idiopathic Pulmonary Fibrosis: Evidence-based Guidelines for Diagnosis and Management, that the "diagnosis of Idiopathic,* Am. J. Respir. Crit. Care Med, Vol. 183, pp. 788-824, 2011

installer. Dr. Storm's opinion that Mr. Montoya's pulmonary fibrosis was related to his work is contradicted by substantial credible evidence, including the prior radiographic evidence, that demonstrates that Mr. Montoya's pulmonary fibrosis was present before long before he began work as a cabinet/countertop installer, nor is it consistent with his prior indication in 1978 that Mr. Montoya had "idiopathic pulmonary fibrosis". As noted above, the ALJ credits the opinions of Dr. Schwartz and Dr. Jacobs to find that Mr. Montoya, more probably than not, had pulmonary fibrosis in the early 1950's and than the cause for the development his interstitial lung disease is unknown, i.e. it is idiopathic.

14. Claimant has failed to establish the requisite causal connection between the death of Mr. Montoya and his work which would entitle her to ongoing death benefits.

CONCLUSIONS OF LAW

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

General Legal Principals

A. 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).

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

Causation

C. To recover death benefits Claimant must prove that Mr. Montoya's death arose out of and in the course of employment. *Section 8-41-301(1)(b), C.R.S*. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957)(mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Rather, it is claimant's burden to prove by a preponderance of the

evidence that there is a direct causal relationship between the employment and death. *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo.App. 1985)(no causal connection found between workers employment and his fatal injuries resulting from idiopathic fall).

D. Whether the industrial injury or disease was a significant causative factor in the death of decedent is a question of fact for the ALJ to resolve by a finding supported by substantial evidence. *Durocher v. Industrial Claim Appeals Office*, 905 P.2d 4 (Colo. App. 1995).

E. In this claim for benefits, Claimant alleges that Mr. Montoya was exposed to wood and Corian dust which caused pulmonary fibrosis, and in turn his death. For death resulting from occupational exposure, Claimant must prove the death was precipitated by that exposure. *Claimant's of Rumsey v. State Compensation Insurance Authority*, 162 Colo. 545, 427 P.2d 694(1964). Consequently Claimant's case involves a question of whether Mr. Montoya developed an "occupational disease" occasioned by his exposure to dust (wood/Corian) which caused his death. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, an occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he/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).

F. As found here, Claimant has failed to meet her burden to establish that Mr. Montoya's pulmonary fibrosis and subsequent death were caused or hastened by the hazards of his employment as a cabinet/countertop installer, namely exposure to wood and/or Corian dust.. To the contrary, the persuasive medical evidence establishes that

while Mr. Montoya's death was caused by pulmonary fibrosis, the cause of his pulmonary fibrosis was unrelated to his work as a cabinet/countertop installer. Speculative testimony that wood and/or Corian dust may be risk factors for the development of pulmonary fibrosis is insufficient to prove a causal connection between Mr. Montoya's death and his exposure. See *Claimant's of Rumsey, supra.*

ORDER

It is therefore ordered that:

1. Claimant's claim for death benefits is denied and dismissed

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

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

DATED: October 14, 2015

/s/ Richard M. Lamphere

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that Dr. Eicher is a physician authorized to treat claimant for his work injuries?

- Whether claimant has proven by a preponderance of the evidence that he is entitled to a change of physician to Dr. Eicher as the authorized treating physician?

FINDINGS OF FACT

1. Claimant sustained an admitted injury while employed with employer on Friday, February 19, 2015. Claimant testified at hearing that he was injured when a 900 pound catwalk crushed claimant trapping his hand against a tank. Claimant testified the catwalk crushed his upper body and his face was bleeding. Claimant testified that he was unconscious for approximately thirty (30) seconds following the injury. The injury was witnessed by Mr. Weed, a co-worker.

2. Claimant testified he spoke with a nurse at Axiom following his injury on February 19, 2015 and continued working. Claimant testified he worked approximately 20 to 30 more minutes before driving home.

3. Respondents filed an employer's first report of injury on February 23, 2015 noting that claimant's injury included a concussion.

4. Claimant was referred for medical treatment with Grand River Health and Safety Center. Claimant was initially evaluated by Mr. Zimmerman a physician's assistant, on February 23, 2015. Mr. Zimmerman noted that claimant has injured when a catwalk fell striking him and crushing him between the tank and the catwalk. Claimant reported he was having pain on the left side of his face, neck, right elbow and both shoulders. Mr. Zimmerman noted ecchymosis on the left side of his face. Mr. Zimmerman noted claimant wanted him to prescribe some additional pain medication but since claimant was already getting pain medication from another physician for a previous back problem, Mr. Zimmerman declined to prescribe additional medications. Mr. Zimmerman noted claimant was upset with him regarding this issue.

5. Claimant testified he requested to be seen by Dr. Coleman with Grand River Health and Safety Center after his appointment with Mr. Zimmerman due to the bad experience he had with his evaluation with Mr. Zimmerman.

6. Claimant was evaluated by Dr. Coleman on March 3, 2015. Dr. Coleman noted claimant was presenting for neck pain along with a strain of his right shoulder. Dr. Coleman recommended claimant undergo a magnetic resonance image ("MRI") of

his cervical spine and right shoulder and to follow up after completion of the diagnostic exams. Dr. Coleman also recommended claimant get his pain meds “per family Doc”.

7. Claimant testified at hearing that he was treating with Dr. Eicher for a prior workers’ compensation injury. Claimant testified he told Dr. Coleman of his pain contract with Dr. Eicher and Dr. Coleman instructed claimant that if he needed pain medications, he needed to receive them through Dr. Eicher.

8. Claimant testified he went to Dr. Eicher and Dr. Eicher modified his medications to increase his Oxycontin, Celebrex and Gapapentin among other modifications. Claimant testified at hearing that insurer was paying for claimant’s medications from Dr. Eicher, but not for the medical appointments with Dr. Eicher.

9. Claimant returned to Dr. Coleman on March 30, 2015. Claimant was referred for occupational therapy. The Occupational Therapist noted on April 10, 2015 that claimant would be assessed for his concussion symptoms by Ms. Mullaney.

10. Claimant testified at hearing that part of his frustration with Dr. Coleman was his failure to treat his concussion symptoms. However, the medical records document that some consideration was given to claimant’s concussion symptoms from the medical providers.

11. Claimant testified that Dr. Eicher recommended that claimant be sent to a neurologist. Dr. Coleman eventually referred claimant to a neurologist, although claimant testified this referral took 3 months to occur.

12. Claimant was evaluated by Dr. Eicher on April 27, 2015. Dr. Eicher noted that claimant could not get treatment due to the transfer approval not being done yet. Dr. Eicher issued a “To Whom it May Concern” letter on June 26, 2015 regarding claimant. The letter noted claimant continued to complain of headaches and blurred vision and noted claimant was not getting any treatment for his concussion and traumatic brain injury. Claimant was also complaining of shoulder and knee pain. Dr. Eicher recommended claimant return to Dr. Coleman and request a neurological workup.

13. Claimant entered into evidence recordings of visits and phone calls with adjusters and medical providers that he recorded serendipitously including recordings with Ms. Kitts, the adjuster and Dr. Coleman. The ALJ finds that the recordings establish that claimant’s case was handled in an appropriate manner in this case. Nothing in the recordings leads the ALJ to believe that his claim was handled in an inappropriate way. Claimant appears to lead the conversations with the treating physicians where he wants the conversations to go and in his conversation with Ms. Arthur on March 23, 2015 miscontrues his discussions with Dr. Kopich on March 19, 2015. Claimant informed Ms. Arthur that Dr. Kopich replied he wished patients wouldn’t be provided with their MRI reports after claimant inquired with Dr. Kopich about his cervical MRI. However, Dr. Kopich’s response to claimant involving the MRI being given to patients was in response to claimant’s inquiry about his shoulder MRI.

14. Claimant also claimed in the recorded conversation with Ms. Arthur that Dr. Kopich told him the physical therapy would repair the damage to the discs in his neck. At no point during Dr. Kopich's exam did he state that the physical therapy would fix the discs in claimant's neck. Dr. Kopich stated he felt time would improve claimant's neck symptoms, but never indicated the physical therapy would improve his cervical discs.

15. Moreover, claimant indicated to Ms. Arthur that he had concerns with his memory. Claimant did not complain significantly about his memory or alleged post concussive symptoms to Dr. Kopich in his examination 4 days prior. When claimant complained of his memory problems to Ms. Arthur, Ms. Arthur instructed claimant that he should return to the doctor. When claimant raised issues with regard to his appointment with Ms. Arthur, she again instructed claimant to return to Dr. Coleman as soon as possible.

16. While claimant testified he was recording the conversations because of his memory problems, the ALJ finds the recordings were made without the knowledge of all parties involved. If claimant were truly using the recordings because of memory issues, there would be no reason for claimant to fail to inform the parties of his intent to record the conversations.

17. The ALJ finds that claimant was referred by Dr. Coleman to Dr. Eicher for medical treatment, including his medications. The ALJ relies on the testimony of claimant along with the records from Dr. Coleman that provided claimant with a referral to Dr. Eicher for treatment, including the managing of his medications. The ALJ notes that it is understandable that Dr. Coleman did not want to provide medications to claimant when he was previously receiving medications from Dr. Eicher, which explains the referral to Dr. Eicher for medications. It is also understandable that claimant would need to be evaluated by Dr. Eicher for his continued receipt of medications, and the ALJ finds that this medical treatment is within the chain of referrals from Dr. Coleman.

18. The ALJ finds claimant has failed to present evidence sufficient to substantiate a change of physician to Dr. Eicher as the authorized treating physician. The ALJ notes that while Dr. Coleman didn't immediately provide claimant with treatment for his alleged concussion, he has considered the recommendations of claimant and other physicians and has provided claimant with the referral to a neurologist to treat his symptoms. The ALJ finds that Dr. Coleman's treatment has been reasonable considering the complicated nature of this case and finds that there is no need to change claimant's treating physician from Dr. Coleman.

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. 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).

4. "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).

5. As found, Dr. Eicher is authorized as a referral from Dr. Coleman to provide evaluation and treatment including medications for claimant for his work injury. As found, Dr. Coleman indicated to claimant that he should receive his medications from Dr. Eicher and made a referral for claimant to receive medical treatment including the medications through Dr. Eicher.

6. Upon proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), *supra.* Claimant may procure a change of physician where she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts are reluctant to allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

7. In deciding whether to grant a change in physician, the ALJ should consider the need to insure that the claimant is provided with reasonable and necessary medical treatment as required by § 8-42-101(1), *supra*, while also protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be held liable. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO 11/27/07); s*ee Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). Moreover, the ALJ is not required to approve a change in physician because of a claimant's personal reasons, including mere dissatisfaction. *See Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

8. As found, claimant has failed to demonstrate that he is entitled to a change of physician to Dr. Eicher as the authorized treating physician in this case.

ORDER

It is therefore ordered that:

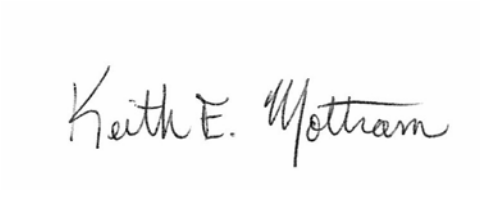
1. Dr. Eicher is a physician authorized to treat claimant for his work related injury as a referral from Dr. Coleman. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his industrial injury from Dr. Eicher.

2. Claimant's request to have Dr. Eicher become the authorized medical provider to handle his workers' compensation claim is denied.

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: October 14, 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 she suffered a compensable injury arising out of and in the course of her employment with Employer on March 12, 2015.

STIPULATIONS

1. If the claim is found compensable, Claimant's average weekly wage at the time of injury was $1,043.61.

2. If the claim is found compensable, Claimant is entitled to temporary total disability benefits, subject to applicable offsets, from April 1, 2015 through April 18, 2015.

3. If the claim is found compensable, the treatment Claimant has received to date at Concentra is authorized treatment. Respondent lost its right of selection as of March 27, 2015. Claimant elected to obtain treatment from Aurora Internal Medicine Clinic and T. Scott Gilmer, M.D. Treatment Claimant received from Aurora Internal Medicine Clinic and referrals from Aurora Internal Medicine Clinic related to Claimant's lower right extremity after March 27, 2015 is authorized.

FINDINGS OF FACT

1. Claimant works for Employer as a mental health clinician II at a mental health facility located at Fort Logan, Colorado. Claimant has been so employed for over twenty years.

2. As a mental health clinician II Claimant has duties that involve supervising residents of the facility to ensure they do not cause harm to themselves, harm to other residents, or harm to employees.

3. As part of her duties Claimant supervised residents when they received haircuts at the facility and accompanied them into a room where the hairdresser would perform several haircuts. Policy required that a staff member be present for the duration of the haircut. *See* Exhibit 3.

4. On March 12, 2015 Claimant was supervising residents who were getting haircuts in the dayroom. There is a couch in the dayroom that is approximately 13 inches off the ground. Claimant was sitting on this couch and she stood up to get the

next inmate ready for his haircut and to help sweep up hair clippings when she felt and heard a pop in the back of her right knee.

5. Claimant testified that the couch in the dayroom is lower than an average couch so that if a resident falls off the couch, the distance to the ground is less and will hopefully minimize any potential injuries. Claimant testified that the couch at her home is approximately 17 inches off the ground.

6. On March 12, 2015 Claimant reported the incident to her supervisor. Claimant filled out an Injury/Exposure on the Job form (IOJ). In the IOJ form Claimant indicated she was monitoring haircuts in the day area when she stood up from a low couch and felt and heard a pop in the back of her right knee. *See* Exhibit 4.

7. Claimant did not report pain or injury to her right hamstring, but only to the back of her right knee on the initial form she filled out.

8. Claimant's supervisor filled out a form the same day indicating that Claimant reported she was sitting on a low couch in the day room when she stood up and felt a sharp pain and heard a pop behind her knee. Claimant's supervisor indicated Claimant continued to feel pain and had difficulty walking, that the couches in the day room are lower to the ground, and that Claimant was being sent to Concentra for treatment. *See* Exhibit 4.

9. On March 12, 2015 Claimant was evaluated at Concentra by NP Rosalie Einspahr. Claimant reported to NP Einspahr that she got up from a low couch and heard a pop in her posterior right knee area and that she had knee pain and lower leg pain. NP Einspahr noted on examination that Claimant's right knee had limited range of motion and was painful in all planes, that Claimant had tenderness in the posterior knee, and that Claimant had a positive Lachman's test. NP Einspahr also noted that Claimant's right lower leg had posterior tenderness and restricted range of motion. NP Einspahr assessed strain of right knee and leg. NP Einspahr provided Claimant a cane, planned for her to use an ace wrap, and took her off work until an appointment Monday morning March 16, 2015. *See* Exhibit 8.

10. On March 16, 2015 Claimant was evaluated at Concentra by Pa-C Valerie Maes. Claimant reported she had been unable to work due to the pain and that she needed to be able to walk and react to patients. Claimant reported she had been taking her own Vicodin for pain relief. Claimant reported at the time of injury she felt and heard a loud pop in the back of her knee and she complained of continued knee pain. PA Maes noted Claimant's symptoms were in the right posterior knee and that the pain radiated to the right lower leg. PA Maes noted on examination that Claimant's right knee was swollen in the medial aspect and popliteal fossa, that Claimant had diffuse medial knee and posterior knee tenderness, and that Claimant had limited and painful range of motion in all planes. PA Maes also noted Claimant had a positive Lachman's test and positive posterior drawer sign and that her right lower leg had posterior tenderness and restricted range of motion. PA Maes also assessed strain of right knee

and leg and referred Claimant to physical therapy. PA Maes returned Claimant to modified work status with restrictions of using a cane, no squatting, no kneeling, wearing splint/brace on right lower extremity, no walking on uneven terrain, no climbing stairs, no climbing ladders, and weight bearing as tolerated. *See* Exhibit 8.

11. On March 18, 2015 Claimant underwent physical therapy with Kyle Primeau, DPT. Claimant reported she had gone from a sit to stand position on and off a low chair when she felt a pop in the back of her knee. Claimant reported posterior knee pain and some right patellar pain. PT Primeau noted during the course of physical therapy that Claimant had pain in the lateral hamstring following a hamstring stretch and with resisted lateral hamstring. *See* Exhibit 8.

12. On March 18, 2015 a Workers Compensation – First Report of Injury or Illness form was filled out. The form indicated that Claimant felt a sharp pain and heard a pop behind her knee when standing up from a couch. *See* Exhibit 5.

13. On March 23, 2015 Claimant was evaluated by PA Maes. PA Maes noted Claimant was returning for a recheck of her right knee injury and Claimant reported her knee was improving with medications and physical therapy. PA Maes noted the symptoms were still located in the right posterior knee. PA Maes noted on examination that the right knee appeared normal with no swelling but continued to be diffusely tender in the medial and posterior knee. PA Maes noted that range of motion was now painless in all planes and that Claimant had a negative Lachman's test and negative posterior drawer signs. PA Maes noted that Claimant's right lower leg now appeared normal with no tenderness. *See* Exhibit 8.

14. On March 23, 2015 Claimant also underwent physical therapy performed by PT Sidway McKay. PT McKay noted that Claimant had felt pain in her lateral hamstring following hamstring stretching on March 18, 2015. PT McKay recommended as part of the plan that Claimant continue therapeutic exercises such as stretching, strengthening, aerobic conditioning, and balance activities to address the impairments of range of motion, muscle performance, de-conditioning, and balance. *See* Exhibit 8.

15. On March 25, 2015 Claimant again underwent physical therapy. Claimant reported that she did too much on Monday and had a large increase in pain. Claimant reported during physical therapy that she had more pain in her hamstring than in her anterior knee. *See* Exhibit 8.

16. Respondents provided medical treatment until March 27, 2015 when they filed a Notice of Contest indicating that liability for the claim was being contested/denied for the reason of the injury/illness not being work related. *See* Exhibit 6.

17. In a letter sent to Claimant on March 27, 2015 Respondents informed Claimant of the denial and advised Claimant that they were willing to pay for conservative treatment with Employer's authorized medical provider until March 27,

2015. The letter further advised Claimant that any treatment after March 27, 2015 would be considered her responsibility. *See* Exhibit 7.

18. On March 31, 2015 Claimant was evaluated at Aurora Internal Medicine Clinic by Lisa Lumley, FNP-C. Claimant reported she was there for right knee pain from an injury that happened at work when she stood up from a couch and heard a pop behind her knee. Claimant reported initially that she went to a workman's comp clinic for evaluation, but that her claim was denied. Claimant reported being upset that the claim was denied. NP Lumley noted on examination that Claimant's right knee showed mild ballotment and mild posterior bulge with chronic 3 inch round soft lipoma proximal to the medial right knee. NP Lumley noted negative Lachmans/Drawer tests, and a positive pattelar grind. NP Lumley diagnosed right knee pain and provided a differential diagnosis of osteoarthritis, baker's cyst, and secondary deep vein thrombosis. NP Lumley ordered a right knee x-ray and right lower extremity ultrasound and indicated she would discuss the plan with Claimant after imaging. *See* Exhibit 9.

19. On March 31, 2015 Claimant underwent right knee x-rays that were interpreted by Joseph Tan, M.D. Dr. Tan provided an impression that the radiographs were negative for acute bony abnormality, that Claimant had mild to moderate tri-compartmental osteoarthritis greatest along the lateral compartment, and that Claimant had moderate joint effusion. *See* Exhibit G.

20. On April 7, 2015 Claimant was evaluated by NP Lumley. NP Lumley noted Claimant was there for follow up with complaints of right lower extremity pain and right knee swelling. NP Lumley noted that Claimant's right knee x-ray showed tri-compartment osteoarthritis with moderate effusion and that the right lower extremity ultrasound showed chronic deep vein thrombosis at the peroneal trunk, right tibial, and right peroneal. NP Lumley noted a follow up ultrasound was done that morning with no change from last week. NP Lumley diagnosed deep venous thrombosis. *See* Exhibit E.

21. On April 13, 2015 Claimant was evaluated at Aurora Internal Medicine Clinic by T Scott Gilmer, M.D. Dr. Gilmer noted Claimant was there for follow up of her right knee issues. Claimant reported her knee was starting to improve and that she wanted Dr. Gilmer to sign her return to work papers. Dr. Gilmer noted Claimant had much less instability in the right knee and that exactly what happened was not clear. Dr. Gilmer noted that post injury claimant had chronic deep vein thrombosis in the right calf and that an attempt to immobilize with a right knee brace provoked the deep vein thrombosis. Dr. Gilmer diagnosed: deep vein thrombosis likely provoked from brace given to her; pain in joint, lower leg with an exact injury unclear and suspicion that Claimant ruptured a bakers cyst that could have been associated with inflammation that caused the chronic deep vein thrombosis; and primary localized osteoarthrosis, lower leg. Dr. Gilmer referred Claimant to Dr. Fitzgerald for a second opinion regarding Claimant's significant osteoarthrosis. Dr. Gilmer recommended treating with weight loss, "weightless" exercise, and quad strengthening. *See* Exhibit E.

22. On April 19, 2015 Claimant returned to full duty work.

23. On April 23, 2015 Claimant was evaluated by Dr. Fitzgerald's P.A., Heather Cresmen. Claimant reported right knee pain. Claimant reported suffering a fall fifteen to eighteen years ago that was treated with arthroscopic partial meniscectomy and debridement and that she occasionally had some aching soreness in the knee. Claimant reported her knee pain was more severe since an injury that occurred at work on March 12, 2015 when she attempted to stand from a seated position and had sharp pain over the posterior aspect of the right knee. Claimant reported her pain was moderate, sharp and achy, and constant since March 12, 2015. PA Cresmen noted on examination that there was moderate tenderness to palpation over the lateral joint line and medial joint line and crepitus throughout range of motion. PA Cresmen noted negative Lachman's and posterior drawer. PA Cresmen reviewed the March 31, 2015 x-rays that showed moderate tri-compartmental degenerative arthritis. She provided an impression of right knee degenerative arthritis. PA Cresmen performed a corticosteroid injection intra-articularly. PA Cresmen discussed other future treatment options and recommended lifestyle modifications including diet, exercise, and proper shoe wear. *See* Exhibit H.

24. On August 19, 2015 Claimant underwent an Independent Medical Evaluation (IME) performed by Timothy O'Brien, M.D. Claimant reported to Dr. O'Brien that on March 12, 2015 she was standing up from a low couch when she felt a pull and pop in her hamstring tendon. Claimant pointed to an area posterior in the thigh above the knee and lateral to the outside of the mid aspect of the thigh. Claimant reported to Dr. O'Brien that she did not have a knee injury but rather that she had a hamstring pull. Claimant reported she discontinued the knee brace because she was told she did not have a workers' compensation injury because of a pre-existing condition. Claimant reported still having pain that could drop below the knee. Claimant reported she could tell the difference between her hamstring injury and her pre-existing knee arthritis and reported her belief that the hamstring injury aggravated her knee arthritis due to compensation and limping. *See* Exhibit I.

25. Claimant reported to Dr. O'Brien that her private doctor referred her to Dr. Fitzgerald and that she received a knee injection for her osteoarthritis which was a pre-existing condition. Claimant reported 15 years ago she had surgery and the meniscus or pad on the inside of her knee was removed and that she really did not have much trouble and healed from that surgery. Claimant reported that she had not had any ongoing discussions with her primary care doctor about her knee pain and she did not recall any need for treatment for her knee condition. *See* Exhibit I.

26. Dr. O'Brien opined that the onset of right knee pain that Claimant noted while at work was a manifestation of her personal health and a reflection of her longstanding and underlying moderately-advanced osteoarthritis in the right knee and thus no work injury occurred on March 12, 2015. Dr. O'Brien opined that arising from a seated position is not an injury mechanism, but is a daily activity. Dr. O'Brien noted that the fact that Claimant noted pain was not unexpected but rather predictable and expected given her obesity, age, and underlying longstanding osteoarthritis in the knee.

Dr. O'Brien opined that she would be expected to have knee pain at unpredictable times that can wax and wane. Dr. O'Brien opined that her underlying condition can manifest not only as pain but also as stiffness, swelling, cracking, and crunching or clicking. *See* Exhibit I.

27. Dr. O'Brien opined that Claimant had longstanding knee pain as the result of a prior injury and an arthroscopic meniscectomy which is to be expected. He opined that when an arthroscopy removes meniscal tissues, progressive and premature osteoarthritis of the knee is expected and predictable and that this is a pre-existing condition not in any way causally related to an occupational exposure. Dr. O'Brien opined that Claimant had end-stage osteoarthritis of the knee and was a candidate for a total knee arthroplasty when her pain becomes so severe as to impair her lifestyle to an extent that she cannot tolerate. He opined that Claimant did not become a candidate for knee replacement in a more precipitous fashion because of her work or because of the March 12, 2015 incident. Dr. O'Brien opined that episodic right knee pain in Claimant's life is expected and predictable consequence of her age, her body habitus and her pre-existing history of osteoarthritis due to her genetic makeup and her prior knee injury and arthroscopic meniscectomy. *See* Exhibit I.

28. Dr. O'Brien's opinions are credible and persuasive and consistent with an extensive medical history of right knee issues dating back to 1999.

29. Prior to the March 12, 2015 incident, Claimant had received significant treatment to her right knee and had ongoing complaints in her right knee.

30. On March 6, 2015 just six days prior to her incident at work, Claimant sought treatment with Dr. Gilmer. Claimant reported having problems with arthritis in both of her knees. Dr. Gilmore noted this was a chronic recurring problem and that Claimant regularly had issues with it. Claimant requested a refill of her pain medications for her knee pain. Dr. Gilmer diagnosed osteoarthritis of the knee, with both chondromalacia patellae and degenerative joint disease, especially on the right knee. Dr. Gilmer encouraged Claimant to lose weight and suspected that Claimant had some meniscal damage. Claimant reported that she did not want to have a knee scope. Dr. Gilmer refilled a prescription for hydrocodone-acetaminophen. *See* Exhibit E.

31. On November 15, 2013 Claimant was evaluated by Dr. Gilmer. Dr. Gilmer noted her problems included chronic lower leg osteoarthritis and Claimant reported that her arthritis was acting up. Dr. Gilmer noted this was a long term problem and diagnosed osteoarthritis both knees, worse on the right. Dr. Gilmer provider patient education regarding osteoarthritis and how to cope with pain, how to manage pain, and noninvasive treatment options. *See* Exhibit E.

32. On May 31, 2013 Claimant was evaluated by Dr. Gilmer. Dr. Gilmer diagnosed osteoarthritis of the knee and opined that Claimant would probably knee total knee arthroplasty at some point. For her knees, he refilled her prescription for diclofenance. *See* Exhibit E.

33. On May 19, 2006 Claimant was evaluated by Dr. Gilmer. Claimant reported continued problems with right knee bursitis and Dr. Gilmer opined it was probably due to her underlying degenerative changes and the particular way she exercises. *See* Exhibit E.

34. On May 26, 2006 Claimant underwent an ultrasound guided aspiration and injection of her right knee performed by Michael Otte, M.D. See Exhibit G.

35. On March 17, 2006 Claimant was evaluated by Dr. Gilmer. Claimant reported continued problems with her right knee clicking, popping, and having dysfunction. Claimant reported the right knee occasionally catches. Dr. Gilmer noted that Claimant had a right knee arthroscopy in 1999 that showed condoromalacia patellae and he opined it was likely continuing. *See* Exhibit E.

36. On October 31, 2003 Claimant was evaluated by Dr. Gilmer. Dr. Gilmer assessed knee arthritis and discussed switching Claimant from Daypro to Voltaren. *See* Exhibit E.

37. On April 5, 2002 Claimant was evaluated by Dr. Gilmer. She reported that due to the arthritis in her ankles and knees she had difficulty exercising. Dr. Gilmer assessed osteoarthritis of the knees. *See* Exhibit E.

38. Claimant's testimony, overall, is not found credible or persuasive. Her claim that on March 12, 2015 she suffered a right hamstring injury is not persuasive and is inconsistent with her initial reports of injury both to Employer and to medical providers that the pain, popping, and injury was to her right knee. There was no mention of any hamstring pain until March 18, 2015 when after stretching at physical therapy she reported pain in her hamstring. Additionally, her testimony that prior to March 12, 2015 she had no problems with and no symptoms in her right knee or her right lower extremity is also inconsistent with the medical records. From 1999 when she underwent right knee surgery and until six days prior to her work incident, Claimant consistently complained of right knee arthritic pain. Claimant received multiple medication prescriptions over the years to address the pain in her knees, particularly the right knee including a refill of hydrocodone-acetaminophen just six days prior to her 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

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P.3d 999 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 314 P.2d 297 (Colo. 1957).

Claimant has established that the incident of increased right knee pain on March 12, 2015 occurred during her normal working hours and in her normal place of employment. However, Claimant has not met her burden to show that she suffered an injury that arose out of her employment with Employer. She has failed to establish a causal connection between her employment duties and her increased right knee pain. *See Horne v. St. Mary-Corwin* Hospital, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories*, W.C. No. 3-960-622 (October 10, 1991); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000). The precipitating cause of Claimant's injury in this case was her pre-existing knee condition. *See Alexander v. Emergency Courier Services*, W.C. No. 4-971-156 (October 14, 2014); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000). The origin and cause of Claimant's injury and increased right knee pain on March 12, 2015 was not due to her employment or her employment duties. Rather the origin and cause of her injury was her significant underlying osteoarthritis. The opinion of Dr. O'Brien in this regard is found credible and persuasive. Claimant did not suffer from an unexplained injury. Rather, on March 12, 2015 she suffered expected pain in her right knee due to her significant pre-existing osteoarthritis. This increased pain would have occurred whether or not Claimant was employed and her knee became painful due to her underlying condition and not due to her employment duties. As found above, in May of 2013 Dr. Gilmer noted that Claimant would likely need a total knee arthroplasty. Claimant also reported knee pain at an appointment with Dr. Gilmore just six days before the alleged work injury. Dr. O'Brien is persuasive that her pain that waxed/waned over several years is expected, is not unexplained, and is due to her underlying non work related osteoarthritis. Here, the increased right knee pain would have occurred regardless of whether Claimant was employed as a continuation of her underlying condition and Claimant has failed to establish a causal connection to her employment.

Special Hazard

Additionally, the argument that the low couch in the day room was a special hazard is not found persuasive. Where the precipitating cause of an injury is a preexisting condition suffered by the claimant, the injury is not compensable unless a "special hazard" of the employment combines with the preexisting condition to cause or increase the degree of injury. *National Health Laboratories v. Industrial Claim Appeals* Office, 844 P.2d 763 (Colo. App. 1992). This principle is known as the "special hazard" rule. *Ramsdale v. Horn,* 781 P.2d 150 (Colo. App. 1989). In addition, to be considered

an employment hazard for this purpose, the employment condition must not be a ubiquitous one: it must be a special hazard not generally encountered. *Id.* (high scaffold constituted special employment hazard to worker who suffered epileptic seizure and fell: *Gates Rubber Co. v. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations).

Here, Claimant heard and felt a pop behind her right knee while standing up from a seated position. Although the testimony and evidence established that the couch in the day room that she was sitting on was slightly lower than an "average" couch, the couch is not found to be a special hazard. Seats of varying heights and sizes including couches, chairs, and benches are ubiquitous and generally encountered in everyday life and in many non-employment locations. The couch Claimant was sitting on was not a special hazard of employment but a ubiquitous condition which Claimant could have encountered off the job. *See Horne v. St. Mary-Corwin* Hospital, W.C. No. 4-205-014 (April 14, 1995) and *Crass v. Cobe Laboratories*, W.C. No. 3-960-622 (October 10, 1991). Here, Claimant's underlying condition was the precipitating cause of her injury and increased right knee pain and there was no special hazard that combined with her underlying condition to either cause or increase the degree of her injury.

Medical Treatment at Concentra prior to March 27, 2015

Claimant received medical treatment at Concentra, Employer's authorized provider, until March 27, 2015 when a Notice of Contest was filed. When an employer or carrier has furnished medical treatment they may not recover the cost of care form a claimant except in the case of fraud. *See* § 8-42-101(6)(a), C.R.S. Here, there has been no showing of fraud and Respondents are liable for the costs of medical treatment up to March 27, 2015.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden of proof to establish that she suffered a compensable injury on March 12, 2015. Her claim for benefits is denied and dismissed.

2. Respondents shall pay for the cost of medical treatment from March 12, 2015 until March 27, 2015 when a Notice of Contest was filed.

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

DATED: October 16, 2015

/s/ Michelle E. Jones

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

ISSUES

The issues to be determined by this decision are the following:

1. Whether the claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with employer on or about December 27, 2014;

2. Whether the claimant, if she has proven she sustained a compensable injury, has proven by a preponderance of the evidence that the medical benefits requested are related to his alleged work injury on or about December 27, 2014;

3. Whether the claimant, if she has proven she sustained a compensable injury, has established by a preponderance of the evidence that she is entitled to the right of selection of her authorized treating physician; and,

4. Whether, if the claimant has proven a compensable injury, the claimant has proven she should receive TTD benefits from respondent beginning July 8, 2015.

FINDINGS OF FACT

1. The claimant was injured in the early morning hours of December 27, 2014 while working for the respondent-employer as an assistant manager. On that date, the claimant lifted a tote weighing over fifty pounds which was located in the back office. The tote was filled with bags of dog food as well as other items that needed to be stocked on the store shelves. When the claimant picked up the tote and moved it onto a cart, she felt immediate pain in her lower back. A co-employee, Scott H., was in the office with the claimant at the time it happened as he was just getting off of his night shift. The claimant told Scott her back was hurting and she then rolled the tote out into the aisles of the store to restock the shelves. She completed her scheduled shift.

2. The claimant informed her store manager, Janine Hendricks, about the injury to her lower back the next day and Ms. Hendricks told her that she needed to file an Incident Report. Ms. Hendricks provided her with an Employee Incident Report which the claimant filled out on 12/28/14. When the claimant filled out the form, she first wrote down the date of injury as 12/27/14 but changed it to 12/28/14 at the request of

Ms. Hendricks, because 12/28/14 was the date the claimant filled out the report. When asked about the incident time noted on the incident report, the claimant clarified that 10:30 a.m. was the time she filled out the report on 12/28/14 rather than the time the actual incident occurred on 12/27/14. The claimant observed that she had received no training, even as an assistant manager, as to what should be done in the event of an on-the-job injury.

3. The claimant testified that she began having right shoulder pain a few days after 10/27/14 as well as numbness in her right wrist and hand. At that point in time, the claimant still had not been directed by the respondent-employer as to where to seek medical care. The claimant testified that she asked Ms. Hendricks numerous times where she should seek medical treatment but was not directed where to go until March 4, 2015.

4. The claimant testified that her shoulder pain began to significantly worsen over the next several weeks. By February 12, 2015, when she went to her primary care provider, Dr. Jeffrey Snyder, for a cough and sore throat she also spoke to him about her increasing shoulder pain. The claimant explained that she did not complain about her back to Dr. Snyder because she was waiting for the respondent-employer to direct her as to where to seek treatment. She only mentioned her right shoulder because it had gotten to a point where she was having trouble with any use of her right arm. With regards to her right shoulder, Dr. Snyder referred the claimant to Dr. Harroll, who is apparently Mountain View Medical Group's sports medicine physician. Dr. Harroll saw the claimant on February 20, 2015 and referred the claimant for an MRI of her shoulder. He also recommended the claimant be placed on light duty and restricted her lifting to no more than ten (10) pounds. The claimant testified that she took Dr. Harroll's restrictions to Ms. Hendricks immediately.

5. On March 4, 2015 Ms. Hendricks called corporate because she did not know what to do regarding the claimant's injuries and was directed by Vic Gustafson, the respondent-employer's risk manager, to fill out an Associate Incident In-Store Investigation Report, an Employee Incident Questionable Claim Form, and an Employee Incident Video Report. He also directed the claimant to fill out an Associate Work Related Injury/Illness Report at that time and provided the claimant with the Worker's Compensation Designated Provider List. The claimant testified that she had never seen this document prior to March 4, 2015. Ms. Hendricks admitted on cross examination that this specific document was not posted anywhere in the store. The only posters on the walls of the store were the general worker's compensation posters directing employees regarding protocol for reporting a work-related injury.

6. After receiving the Designated Provider List from Ms. Hendricks on 3/4/15, the claimant selected Penrose Mountain Urgent Care as her authorized treating provider (ATP) and sought treatment at that facility which happened to be located at the Penrose Hospital emergency room in Woodland Park. They, in turn, sent the claimant to CCOM.

7. When the claimant learned the claim had been denied by the insurance carrier, she then returned to her primary care physician, Dr. Snyder on 5/6/15. Dr. Snyder noted in that examination that the claimant had lumbar spine pain with a positive straight leg test. He recommended x-rays of the claimant's lumbar spine and referral to a back specialist. On 6/5/15, the claimant was seen by Dr. Phillip Falender, an orthopedic specialist, who noted tenderness along her spinous process and paraspinal muscles, limited range of motion and diffusely diminished deep tendon reflexes in the bilateral lower extremities. He also recommended continued physical therapy and an MRI scan due to the claimant's feeling of heaviness and weakness in her legs.

8. Janine Hendricks, the store manager at the respondent-employer's store where the claimant was employed, testified that on December 28, 2014, the claimant notified her that she had hurt her back the day before (12/27/14) lifting a heavy tote with dog food in it. She testified that she insisted that the claimant fill out the Employee Report. Ms. Hendricks testified that this was merely a formality because the claimant insisted that her injury was not a "big deal" and that she did not want to get treatment. She testified that it was only after the claimant gave her a copy of her restrictions from Dr. Harroll which placed a 10 pound weight restriction on the claimant and when the claimant insisted that she needed treatment that she started calling the corporate office and risk management to find out what she needed to do.

9. She testified that the claimant never asked her where she should seek treatment or even notified her that she wanted to seek treatment between 12/28/14 and 3/4/15. Ms. Hendricks did testify though, that even though she did not think the claimant was "really hurt," she made sure that the claimant did not have to lift anything heavy between 12/28/14 and 3/4/15 to accommodate the claimant. She also made sure that other individuals were available when the claimant needed to lift anything heavy. She claimed that she did this out of "respect" for the claimant.

10. Ms. Hendricks admitted that failed to follow company protocol when she failed to notify corporate of claimant's injury on December 28, 2014. She testified that she has since had a long conversation with Vic Gustafson, risk manager, which included more training as to what to do when an employee reports an injury.

11. Vic Gustafson, a risk and safety manager for the respondent-employer testified that all the documents which are needed to report an on the job injury are on a main company server which can be accessed by the managers and assistant managers. He testified that all managers and assistant managers receive training as to what should be done when an employee notifies them of an on-the-job injury. Mr. Gustafson testified that he had never personally seen the worker's compensation posters in the Woodland Park store but knows that it is corporate policy that the posters (as what to do when you sustain a work-related injury) be put up on the walls in plain view.

12. Dr. Snyder, the claimant's PCP, saw the claimant on July 8, 2015, subsequent to the claim being denied by the respondent, and ordered the claimant be excused from work. Since then she has not been returned to work.

13. Dr. Eric Ridings testified for the Respondents. Dr. Ridings concluded that the claimant did not injure her lower back or right shoulder on December 27, 2014 for a myriad of reasons, including but not limited to, the fact that the claimant did not immediately seek treatment for injuries which should have caused her immediate pain, she kept working in a fairly heavy job throughout January and February, the first medical records from Dr. Snyder and Dr. Harroll do not reflect low back pain or consistency with her date of injury (12/27/14), and his own examination of the claimant in August 2015 did not show muscle spasm in her lumbar spine nor pain in the area of her shoulder where he would have expected her to have pain.

14. The crux of Dr. Ridings opinions determining that the back injury is non-work related seems to stem from his opinion concerning the claimant's credibility.

15. The ALJ finds that the claimant is credible with respect to her back injury.

16. The ALJ finds that the claimant has consistently complained of the back condition from the date of injury onward, with the exception of the first reports rendered by Dr. Snyder and Dr. Harroll, for which the ALJ finds the claimant's explanation plausible.

17. Subsequent to the respondent's denial of the claim the claimant was denied continuing treatment with the authorized providers for non-medical reasons. The claimant then went back to her own physician (Dr. Snyder) at Mountain View Medical Group. The ALJ finds that the right of selection passed to the claimant subsequent to the date of the Notice of Contest, 3/27/15. The ALJ finds that Dr, Snyder assumed the role of the claimant's ATP at this point and the respondent is liable for medical treatment

from Dr. Snyder and any referrals he has made since the end of 3/27/15. The ALJ finds that the respondent is bound by Dr. Snyder's 7/8/15 opinion that the claimant could not return to work until a formal evaluation by a worker's compensation physician was completed. The ALJ finds therefore that the respondent is liable temporary total disability benefits from 7/8/15 until such time as the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3), after which the respondents may terminate such TTD payments.

18. The ALJ finds that the opinions and analyses of Dr. Ridings, with respect to the claimant's shoulder condition are credible and more persuasive than medical opinions and analyses to the contrary.

19. The ALJ finds that the claimant has established that it is more likely than not that she suffered an injury to her low back on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

20. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury to her right shoulder on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

21. The ALJ finds that the claimant has established that it is more likely than not that the respondent is responsible for medical care received by the claimant for her back injury.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondent is responsible for medical care received by the claimant for her right shoulder condition.

23. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to temporary total disability benefits commencing on July 8, 2015 and continuing until terminated by operation of law.

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. § 8-40-102 (1), C.R.S.

2. A workers' compensation case is decided on its merits. § 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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

5. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

6. A compensable injury is one that arises out of and in the course of employment. § 8-41-301 (1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); *see also*, *Industrial Commission v. London & Lancashire Indemnity Co.*, 135 Colo. 372, 311 P.2d 705 (1957). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance

of the evidence before any compensation is awarded. C.R.S. § 8-41-301 (1) (c); *Faulkner v. ICAO,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

7. A compensable industrial accident is one which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988) The question of whether claimant had proven a causal relationship between employment and the alleged injury or disease is one of fact for determination of the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995)

8. The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms. *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985).

9. The employer has the right, upon being notified of an industrial injury or occupational disease, to designate the authorized physician to the injured employee in order to initially select the treating physician. C.R.S. § 8-43-404 (5); *Rogers v ICAO*, 746 P.2d 565 (Colo. App. 1987) Respondent is therefore only liable for medical benefits from authorized treating physicians. C.R.S. § 8-43-404 (7); *Wishbone Restaurant v. Moya,* 424 P.2d 119 (Colo. 1967); *Heffner v. El Paso County School Dist. 11*, W.C. 3-926-982 (ICAO August 24, 1990). When an injured employee incurs unauthorized medical expenses, respondent is not liable for such expenses. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973).

10. To establish an entitlement to temporary disability benefits, claimant must prove by a preponderance of the evidence that the industrial injury or disease caused a disability, that he left work as a result of the disability, that he was disabled for more than three regular work days and that he suffered an actual wage loss. C.R.S. § 8-42-103 (1) (b); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

11. As found above, the crux of Dr. Ridings opinions determining that the back injury is non-work related seems to stem from his opinion concerning the claimant's credibility.

12. The ALJ concludes that the claimant is credible with respect to her back injury.

13. The ALJ concludes that the claimant has consistently complained of the back condition from the date of injury onward, with the exception of the first reports rendered by Dr. Snyder and Dr. Harroll, for which the ALJ finds the claimant's explanation plausible.

14. Subsequent to the respondent's denial of the claim the claimant was denied continuing treatment with the authorized providers for non-medical reasons. The claimant then went back to her own physician (Dr. Snyder) at Mountain View Medical Group. The ALJ finds that the right of selection passed to the claimant subsequent to the date of the Notice of Contest, 3/27/15. Section 8-43-404(5), C.R.S.

15. The ALJ finds that Dr, Snyder assumed the role of the claimant's ATP at this point and the respondent is liable for medical treatment from Dr. Snyder and any referrals he has made since the end of 3/27/15.

16. The ALJ finds that the respondent is bound by Dr. Snyder's 7/8/15 opinion that the claimant could not return to work until a formal evaluation by a worker's compensation physician was completed.

17. The ALJ finds therefore that the respondent is liable temporary total disability benefits from 7/8/15 until such time as the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3), after which the respondents may terminate such TTD payments.

18. The ALJ concludes that the opinions and analyses of Dr. Ridings, with respect to the claimant's shoulder condition are credible and more persuasive than medical opinions and analyses to the contrary.

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that she suffered an injury to her low back on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

20. The ALJ concludes that the claimant has failed to establish by a

preponderance of the evidence that she suffered an injury to her right shoulder on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

21. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent is responsible for medical care received by the claimant for her back injury.

22. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the respondent is responsible for medical care received by the claimant for her right shoulder condition.

23. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits commencing on July 8, 2015 and continuing until terminated by operation of law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for her low back injury is compensable.

2. The respondent shall pay for all benefits accruing pursuant to the Workers' Compensation Act of Colorado.

3. The respondent shall pay for all reasonable, necessary, and related medical care received to cure or relieve the claimant from the effects of her low back injury.

4. The claimant's claim for her right shoulder injury is denied and dismissed.

5. The respondent is not responsible for medical care received for the claimant's right shoulder injury.

6. The claimant's authorized treating physician is Dr. Snyder.

7. The respondent shall pay the claimant temporary total disability benefits commencing on July 8, 2015 and continuing until terminated by operation of law.

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

9. 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: October 27, 2015

/s/ original signed by:

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

ISSUE

Whether Respondents haves 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").

STIPULATION

The parties agreed that Claimant initially earned an Average Weekly Wage (AWW) of $1,320.87. However, as of April 1, 2015 Claimant's AWW increased by $106.91 to $1,427.78 to reflect his replacement cost of health insurance benefits.

FINDINGS OF FACT

1. Claimant worked as a Loader Operator for Employer. His job duties included operating equipment to stockpile concrete aggregate material that came off a crush conveyor belt. He also performed maintenance on the equipment and conveyor belt. Claimant additionally changed metal screens that were used to ensure the aggregate material was the appropriate size.

2. In early December 2014 Claimant reported that he had been shaking out a screen to be hoisted to the wash plant when he experienced a "pop" in his right shoulder area. Although Claimant stated that he reported the injury to supervisor James Idris, there is no documentation of the incident. Claimant continued performing his regular job duties for Employer and did not seek medical treatment.

3. On January 20, 2014 Claimant was pushing one of the screens up toward the wash plant and again experienced pain in his right shoulder area. Claimant reported the injury and Employer prepared an incident report. On January 21, 2014 Aggregate Manager Ivan Geer transported Claimant to Work Partners for medical treatment.

4. Claimant returned to light duty work for Employer consistent with his physical restrictions. He initially performed office duties including copying documents and assembling binders.

5. On February 27, 2014 Claimant's light duty work restrictions were relaxed to permit him to operate machinery. However, when he reported to the aggregate pit he was directed to perform maintenance work. Because the job exceeded Claimant's work restrictions, Foreman James Idris instructed him to sit in his truck.

6. Mr. Geer was subsequently advised that Claimant had been sleeping in his truck. After investigating the incident he was unable to determine "who was right and who was wrong." Mr. Geer thus did not discipline either Claimant or Mr. Idris.

7. On March 10, 2015 Claimant was performing light duty work operating machinery. An incident occurred in which Claimant damaged the canopy of a truck with the bucket of his loader. Because of the incident Claimant was required to submit to a drug screen. Mr. Geer drove Claimant from the work site to Work Partners for the drug screen. When they returned to the job site Claimant completed an incident report with Mr. Geer and Mr. Idris.

8. While completing the incident report Claimant asked Mr. Geer whether the loader accident would result in his termination. Mr. Geer responded that a decision rested with his superiors and he was uncertain of the outcome. He informed Claimant that he was Claimant's "best advocate" for navigating the process. While the conversation was winding down Claimant became "heated," threw his glasses on the ground and began cursing. Claimant ultimately exclaimed that Mr. Geer could take the incident report and "shove it up his ass." Mr. Geer noted that Claimant then entered his truck, spun out his tires and left the work site.

9. Later in the evening Mr. Geer and Claimant discussed the incident over the telephone. Mr. Geer informed Claimant that his behavior was unacceptable and unprofessional. Claimant apologized for his outburst and recognized that his behavior was unprofessional. Mr. Geer told Claimant that Employer would make a decision about his job status after it received the drug screen results.

10. Mr. Geer testified that he subsequently discussed the March 10, 2014 incident with upper management. He decided he needed to terminate Claimant for insubordination. Mr. Geer noted that he could not tolerate Claimant's type of behavior in his department.

11. On March 12, 2015 Mr. Geer called Claimant to inform him that he had been terminated. The termination paperwork reveals that Claimant cursed at a Division Manager in an aggressive manner. The documentation reflects that Claimant repeatedly cursed at the Division Manager, threatened repercussions and drove his vehicle off the job site in an aggressive manner at an excessive speed. The specific reasons for Claimant's termination were "rude or offensive behavior" and "insubordination." Mr. Geer explained that insubordination constitutes grounds for termination from Employer.

12. Claimant testified that prior to March 10, 2015 there was no time when he felt his job with Employer was at risk. He remarked that he was surprised by his termination because he believed his job was safe as long as his drug screen result was negative. Claimant explained that he used coarse language with Mr. Geer on March 10, 2015 because he was upset with the chain of events that gave supervisors and co-workers an inaccurate view of his work ethic. He was specifically upset with the implication that he was taking advantage of his work restrictions by sitting in his truck

during work hours. Claimant remarked that he was "pushed to [his] limits" and Employer's "actions led to [his] reaction." He regretted his actions and coarse language with Mr. Geer on March 10, 2015.

13. Mr. Geer acknowledged that coarse language that was not directed at a particular individual was common among workers in the field. Moreover, it was not unusual to be questioned by an employee about his handling of a particular situation. However, Claimant's specific language in an aggressive fashion during a fit of anger on March 10, 2015 is not something Mr. Geer had ever experienced from an employee. Mr. Geer terminated Claimant because he did not want the type of conduct to proliferate.

14. Respondents have established that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under the termination statutes. The record reflects that, while completing an incident report about the March 10, 2015 loader accident, Claimant asked Mr. Geer whether the accident would result in his termination. Mr. Geer responded that a decision rested with his superiors and he was uncertain of the outcome. While the conversation was winding down Claimant became "heated," threw his glasses on the ground and began cursing. Claimant ultimately exclaimed that Mr. Geer could take the incident report and "shove it up his ass." Termination documentation reflects that Claimant repeatedly cursed at Division Manager Mr. Geer, threatened repercussions and drove his vehicle off the job site in an aggressive manner at an excessive speed. The specific reasons for Claimant's termination were "rude or offensive behavior" and "insubordination." Claimant remarked that he was surprised by his termination because he believed his job was safe as long as his drug screen result was negative. Claimant explained that he used coarse language with Mr. Geer on March 10, 2015 because he was upset with the chain of events that gave supervisors and co-workers an inaccurate view of his work ethic. Although Claimant regretted his actions and coarse language on March 10, 2015, the record reveals that Mr. Geer ultimately terminated Claimant because he did not want the type of conduct to proliferate. Under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Claimant precipitated the employment termination by the volitional acts of cursing and aggressive behavior that he would reasonably expect to cause the loss of employment.

CONCLUSIONS OF LAW

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

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

5. As found, 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 the termination statutes. The record reflects that, while completing an incident report about the March 10, 2015 loader accident, Claimant asked Mr. Geer whether the accident would result in his termination. Mr. Geer responded that a decision rested with his superiors and he was uncertain of the outcome. While the conversation was winding down Claimant became "heated," threw his glasses on the ground and began cursing. Claimant ultimately exclaimed that Mr. Geer could take the incident report and "shove it up his ass." Termination

documentation reflects that Claimant repeatedly cursed at Division Manager Mr. Geer, threatened repercussions and drove his vehicle off the job site in an aggressive manner at an excessive speed. The specific reasons for Claimant's termination were "rude or offensive behavior" and "insubordination." Claimant remarked that he was surprised by his termination because he believed his job was safe as long as his drug screen result was negative. Claimant explained that he used coarse language with Mr. Geer on March 10, 2015 because he was upset with the chain of events that gave supervisors and co-workers an inaccurate view of his work ethic. Although Claimant regretted his actions and coarse language on March 10, 2015, the record reveals that Mr. Geer ultimately terminated Claimant because he did not want the type of conduct to proliferate. Under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Claimant precipitated the employment termination by the volitional acts of cursing and aggressive behavior that he would reasonably expect to cause the loss of employment

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 he was responsible for her termination from employment.

2. Claimant initially earned an AWW of $1,320.87. However, as of April 1, 2015 Claimant's AWW increased by $106.91 to $1,427.78 to reflect his replacement cost of health insurance benefits.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: October 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

#JS2FWUJM0D1O3Mv 2

ISSUES

- Whether Claimant suffered an occupational left shoulder injury with a Report of Injury dated December 3, 2014.
- Whether Claimant is entitled to treatment at COSH.

At the commencement of the hearing the parties stipulated that the Claimant's average weekly wage is $960.64.

FINDINGS OF FACT

1. Claimant is a civilian employee of the Denver Police Department where she has been employed since September 2008.

2. Claimant works in the National Crime Information section of the Police Department where she handles a variety of record-keeping tasks. According to Claimant's testimony and the reports of Scott Washam, MA, and Joseph Blythe, MA, Claimant's job duties are basically sedentary.

3. Claimant described her job duties to include researching warrants and recording information about pawn shops (1-2 days per week), transcription (1 day per week), mail (1 day per week), on-line work (1 day per week), working on auto thefts (1 day per week), and scanning (1-2 days a week). Claimant would rotate among several work stations to perform these tasks. Claimant works five days a week, but her testimony about the time she spends on her work tasks would require that she work six to eight days per week.

4. In August, 2010, Kaiser diagnosed Claimant with myofascial pain syndrome with findings of upper back tightness and soreness with neck stiffness. In January 2011, Kaiser noted a history of myofascial pain. In February 2012, Kaiser records noted that for the last three years, Claimant had been awakened by sharp-left-sided upper back pain that radiated to the front of the chest and sometimes down the left arm. Claimant had been diagnosed with a seizure disorder, irritable bowel syndrome, migraines, and asthma.

5. Claimant's asthma was thought to be triggered by fragrances and odorants, and Respondent had accommodated her sensitivity by adopting a no fragrance policy in Claimant's area and providing Claimant with a separated work space. Claimant disputed whether Respondent reasonably accommodated her sensitivity during her alleged work injury. Claimant missed weeks of work attributable to this unrelated dispute.

6. In March 2014, Respondent obtained new scanners. The new scanners were initially placed somewhat above and slightly behind the workstation which required Claimant to reach above and behind her back to feed papers into the scanner.

7. Claimant testified that she began experiencing pain in her shoulder in September 2014. She took no immediate action. On December 3, 2014, Claimant called the "Ouch-Line" at work and reported left shoulder muscle pain that migrated down her arm.

8. On December 4, 2014, Claimant saw Dr. Szczukowski at the Center for Occupational Safety and Heath ("COSH"). Dr. Szczukowski diagnosed left shoulder pain secondary to impingement and ordered an ergonomic worksite evaluation. Dr. Szczukowski noted that Claimant had been seeing a chiropractor weekly for one year for low back and hip pain. She returned Claimant to work with temporary restrictions. She also ordered physical therapy twice a week "to help with muscle spasm in the neck, to improve her posture, and to decrease her shoulder pain." Claimant did not report muscle spasms in her neck or poor posture as part of her alleged work injury and Dr. Szczukowski's order for physical therapy for those conditions does not appear to be related to her claim.

9. Claimant did not provide Dr. Szczukowski her history of myofascial pain syndrome with left upper back tightness. Dr. Szczukowski did not review Kaiser medical records which documented Claimant's medical history of myofascial pain syndrome and left upper back tightness.

10. Claimant inconsistently reported to her treatment providers how much time she spent scanning documents. On December 4, 2014, she reported to Dr. Szczukowski that she was required to do eight hours of scanning one to two days a week. On February 5, 2015, she told Dr. Szczukowski that she used the scanners three days at a time. Claimant reported to Dr. Fall that she scans 100 to 150 documents one day per week over an eight hour shift during which time she also answers the phones. At the hearing, Claimant testified that she spent one to three days a week scanning documents.

11. On December 8, 2014, Scott Washam performed a worksite ergonomic evaluation. Claimant reported to Mr. Washam that she performed approximately six hours of multitasking which included computer use, answering phones, and scanning tasks. He noted that Claimant's scanning workstation required left shoulder external rotation and abduction to place documents in and to remove them from the scanner. In addition, he noted the placement of the keyboard in the desk surface caused shoulder hiking and upper extremity reaching.

12. Mr. Washam recommended that the scanner be lowered to a height which would eliminate vertical reaching. He also advised Claimant to be attentive to her work habits.

13. On December 18, 2014, Claimant returned to Dr. Szczukowski at COSH and reported improvement after attending four physical therapy sessions and not performing any scanning. Dr. Szczukowski reviewed Dr. Washam's report and diagnosed left shoulder strain with symptoms of impingement, work-related secondary to poor ergonomics.

14. On February 5, 2015, Claimant saw Dr. Szczukowski again and stated that her shoulder felt much better. Claimant complained that when she awakens from sleeping with her left arm above her head, she will have a lot of pain in her left shoulder. Claimant has reported the same pain complaint for several years preceding her alleged work injury. She reported that the scanner had been placed on a lower shelf and that she and a colleague alternated doing scanning work every hour. Dr. Szczukowski diagnosed left shoulder strain compatible with impingement, improving.

15. On March 3, 2015, Claimant saw Dr. Dickson at COSH on March 3, 2015 and reported that she was off work for two and a half weeks due to asthma and Respondent's inability to accommodate her fragrance sensitivity. She did not attend any physical therapy sessions during that time. Dr. Dickson noted that despite being off work for this period, Claimant had not noticed full resolution of her symptoms.

16. Dr. Dickson's examination on that date revealed that the maximum tenderness was along the medial margin of the anterior aspect of the deltoid just below the clavicle. Dr. Dickson referred Claimant to Dr. Hewitt for a possible shoulder injection.

17. On March 13, 2015, Claimant saw orthopedic surgeon Dr. Hewitt. She provided, for the first and only time, a history of lifting at work. Dr. Hewitt's note mentioned a history of "chronic back pain," but did not mention Claimant's history of sharp left-sided upper back pain that radiated to the front of the chest and sometimes down the left arm. Dr. Hewitt diagnosed subacromial impingement and provided an injection of Depo-Medrol and Lidocaine.

18. On March 19, 2015, Claimant saw Dr. Blair at COSH. Clamant said the ergonomic changes had "made a big difference" and that she felt that work restrictions were unnecessary. Claimant could abduct to "virtually 180 degrees" without guarding. Dr. Blair advised Claimant that he expected to put her at MMI in one month.

19. Claimant was often not compliant with treatment:

- She did not attend physical therapy during the weeks she was off work due to her dispute with Respondent over accommodating her asthmatic condition.

- She did not take Naproxen, the medication prescribed by her physician during that same time.

- She missed physical therapy appointments between December 4, 2014, and January 8, 2015, to which she attributed a worsening of her symptoms

- She did not follow her work restrictions which required her to take five minute stretching breaks every hour at work.

20. On April 23, 2015, Claimant returned to Dr. Szczukowski and reported that pain had returned with activities like vacuuming and reaching behind her back. There was tenderness on the left trapezius, left pectoralis, and over the coracoids. Dr. Szczukowski noted full range of motion. Dr. Szczukowski stated that the etiology of Claimant's persistent shoulder pain was unclear at this point.

21. On May 27, 2015, Joe Blythe, MA, performed a job-site analysis of the workspace to which Claimant had been assigned to accommodate her asthmatic condition. On page 3 of his report, he stated that Claimant had to work at shoulder level less than 10% of the time. Shoulder-level work was performed when using the scanner, telephone headset, and completing mail duties. Mr. Blythe took pictures during his job analysis and noted that the scanner, when in the position it was in prior to Respondent's ergonomic changes, was in an awkward position for the left upper extremity. Mr. Blythe noted that eleven common risk factors were not present at Claimant's job site.

22. At Claimant's request, Mr. Blythe specifically measured the amount of time Claimant spent performing scanning duties. He concluded that she spent 2.2 minutes per hour or 17.6 minutes per day performing scanning duties.

23. The ALJ finds Mr. Blythe's conclusion that Claimant spent 17.6 minutes per day scanning to be more credible and persuasive than Claimant's inconsistent and vague testimony and reports on that issue.

24. The Addendum to Mr. Blythe's report states, "[Claimant] requested this vocational evaluator document the awkward position of the left upper extremity when using scanner. See pictures 1-5 for details." Mr. Blythe indicated that at Claimant's request the photos were taken at a work station that had not been modified.

25. Claimant alleges that Mr. Blythe made her continue to work even when she reported left shoulder pain, and forced her to work after she requested to stop. Contrary to Claimant's testimony, the timed study was performed at a different workstation where the scanner was waist-high on Claimant when she was seated.

26. The ALJ finds Joe Blythe's report to be more credible and persuasive than Claimant's testimony and reports on this topic.

27. On June 15, 2015, Claimant presented to Dr. Krefft for shoulder pain she alleged was caused by Mr. Blythe's May 27, 2015 work site evaluation. Claimant reported that she had hoped her pain would go away, but instead it worsened over the next few days to weeks. On June 13, 2015, Claimant reported to urgent care. By the

following day, Claimant reported to Dr. Krefft that her pain had improved and her recorded pain scale was 0/10.

28. At that appointment, Claimant reported that her symptoms increased when she was moved to a different workstation to avoid contact with odorants and fragrances. The new workstation did not have an adjustable keyboard or keyboard tray but had a lowered scanner and swivel chair. Claimant told Dr. Krefft about the jobsite evaluation Mr. Blythe performed on May 27, 2015 and claimed she worked in a "non-ergonomic fashion" for 1 ½ hours, causing an increase in her shoulder pain. Claimant reported to Dr. Krefft that she scanned approximately 45 documents during Mr. Blythe's work site evaluation, acknowledging the scanner was lower than it had been in December 2014.

29. Dr. Krefft noted that Claimant had tenderness in the long head of the biceps tendon. Claimant had full range of motion, but mild pain between 70 and 130 degrees of abduction. Dr. Krefft diagnosed biceps tendonitis, probably secondary to activities during the May 27, 2015 jobsite evaluation.

30. At the time of her diagnosis, Dr. Krefft did not have a copy of Mr. Blythe's jobsite evaluation report.

31. At no time were the reaching motions Claimant made to feed paper into the printer forceful. Claimant held pieces of paper in her hand and the reaching motions did not involve lifting any appreciable weight.

32. Dr. Allison Fall performed an examination at the request of Respondent. At the hearing, Dr. Fall was accepted as an expert in the area of physical medicine and rehabilitation who is board-certified in that specialty and is Level II accredited. Dr. Fall reviewed all the medical records as well as the reports from Mr. Washam and Mr. Blythe.

33. In her testimony, Dr. Fall explained that she relied in part upon the diagnostic algorithm found in the Cumulative Trauma Disorder Medical Treatment Guidelines, Rule 17, Exhibit 5. Dr. Fall agreed that shoulder impingement problems are not specifically addressed in Rule 17, Exhibit 5, but opined that assessment of risk factors as described in that Exhibit are a valid method of determining whether Claimant suffered an occupational disease in her left shoulder.

34. Dr. Fall's report noted Claimant's history of myofascial pain disorder with upper back tightness. Claimant also had a history of being awakened by sharp left-sided upper back pain that radiated into the front of the chest and sometimes the left arm. Claimant reported to Dr. Fall that her physical therapist had commented on Claimant's "horrible posture."

35. Dr. Fall's examination of the left shoulder showed no visible abnormalities with unrestricted range of motion for flexion, extension, abduction, adduction, and internal and external rotation. Importantly, no impingement signs were present. Although tests for bicipital tendinitis were not positive, Claimant had some tenderness at

the bicipital groove with moderate palpation. Claimant was neurologically intact and her reflexes and muscle strength were normal.

36. Dr. Fall diagnosed left shoulder myofascial pain complaint with previously noted impingement symptoms, resolved. Dr. Fall opined that Claimant has not suffered an occupational disease as a result of her work at the Police Department. Dr. Fall opined that Claimant's symptoms were due to a number of factors including her age, prior history of a car accident, myofascial pain in the area of the shoulder, and possible somatic factors.

37. Dr. Fall opined that Claimant's activities during the May 27, 2015 jobsite analysis did not cause any new injury or aggravation of a prior injury.

38. The ALJ finds the opinions of Dr. Fall to be more credible and persuasive than those of Dr. Szczukowski on the issue of whether Claimant had a work related injury or disease. Dr. Fall had access to medical records which supported a finding that Caimant had a long-standing history of certain symptoms she attributed to her alleged work injury. On Dr. Fall's physical examination, Claimant had no signs of shoulder impingement and had full range of motion.

39. The ALJ finds it more probably true than not that Claimant did not suffer a work related injury or disease because she delayed seeking treatment by months and she was not compliant with her treatment.

40. Based on the totality of the evidence, the ALJ finds it more probably true than not that Claimant's symptoms were due to her age, prior history of a car accident, myofascial pain in the area of the shoulder, and possible somatic factors as identified by Dr. Fall; and also to Claimant's frustration with Respondent over issues related to her fragrance sensitivity.

41. Claimant has failed to establish by a preponderance of the evidence that she suffered an occupational disease of her left shoulder as a result of work at the Police Department.

CONCLUSIONS OF LAW

Generally

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

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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 (2006).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

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

However, the evidence in a particular case may establish that the claimant's condition represents the natural and recurrent consequences of a preexisting condition unrelated to the alleged industrial injury. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

C.R.S. 8-40-201(14) defines "occupational disease" as follows:

> "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

As found, Claimant has a history of myofascial pain in her left upper back. Many of her pain complaints were in the same areas affected by the previously diagnosed myofascial pain. Use of the new scanner did not require forceful movements or lifting any appreciable weight. Use of the scanner did not meet recognized injury risk factors. Claimant did not use the scanner every day. On days she used the scanner, her average use was 17.6 minutes per day.

Therefore, Claimant's alleged shoulder problems do not meet the definition of occupational disease set forth in C.R.S. 8-40-201(14).

ORDER

1. It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. As such, Claimant's request for medical benefits is also denied.

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

DATED: October 9, 2015

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

ISSUES

- The issues for hearing were compensability, medical benefits-authorized provider, medical benefits-reasonably needed, and average weekly wage.

STIPULATIONS

- The parties stipulated to an average weekly wage of $452.06.
- The parties stipulated that one of the issues for hearing was denial of an MRI.

FINDINGS OF FACT

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

1. Claimant has been employed by Employer as an accounts receivable clerk since 2009.

2. Claimant testified that on December 29, 2014, while returning from making a work related deposit at a neighboring bank, she slipped on ice in Employer's parking lot and fell.

3. Claimant testified that when she fell, her feet went out from underneath her and she landed on her buttocks with both hands striking the ground palms down. She caught herself with her hands at her side. Claimant did not immediately report the injury because she "didn't really feel bad." She testified that her symptoms worsened the following day, at which time she did report the fall.

4. When Claimant reported the injury, she told Employer she did not think she needed to go to a doctor. Employer had Claimant call the nurse's hotline.

5. The nurse's hotline note indicates that Claimant slipped and fell on ice onto her hands and buttocks and had "pain in left shoulder." The nurse's note also reflects that "the pain does not shot [sic-shoot] to any other area." Claimant followed the nurse's recommendation that she to take Advil and ice the area. The nurse advised Claimant that she might continue to feel pain for two to three weeks.

6. Claimant testified that although her symptoms improved, her shoulder continued to pop and crack if she used her left arm overhead. And, although her pain had decreased, it did not completely resolve. Claimant testified that she did not report these symptoms to her supervisor because she was able to continue to do her job.

7. Claimant testified that in late March, she awoke with intense pain in her left shoulder that spread down her arm, and restricted range of motion. When asked what caused the increase in her symptoms, Claimant responded, “I don’t know.”

8. Claimant reported her increased pain to Employer. Claimant again called the nurse hotline and was instructed to see a doctor.

9. On April 3, 2015, Claimant went to Mountain Peaks Urgent Care where she was evaluated by Physician Assistant Elizabeth Singleton. At this visit, Claimant reported a different mechanism of injury for her December 29 fall. Rather than reporting than she landed on her buttocks as she had initially reported, Claimant reported that when she slid on ice at work, she “landed on her left shoulder when trying to catch herself.” The PA’s note of that date stated that her “pain is going all the way down arm, started about 4 days ago and is hard to move shoulder. No recent trauma per pt.” Claimant reported her pain as 9/10 and she was given Valium. She also underwent left shoulder x-rays which were negative for fracture, dislocation, and degenerative changes.

10. On April 9, 2015, Claimant saw Dr. Jeffrey Krebs. Per his medical report, Claimant gave a history of how she slipped on ice in the parking lot and that: “Pain seemed to have subsided then on 3/23/15, she woke up with pain in her L shoulder.” He went on to note “She has intense shoulder pain.” Dr. Krebs refilled Claimant’s Valium prescription. Dr. Krebs believed that Claimant had a left shoulder rotator cuff syndrome or impingement syndrome and requested an MRI.

11. Insurer denied the MRI and further medical treatment.

12. Claimant testified that the symptoms she experienced on or about March 23, 2015, involved pain extending into her arm, which was different from the pain she experienced initially after she fell on December 29, 2014, which was limited to the shoulder.

13. On April 7, 2015, Claimant gave a statement to the insurance adjuster, Sheryl Weber. Claimant reviewed the transcript of the statement and agreed it was accurate.

14. In the statement, Claimant discussed her initial symptoms and her call with the nurse’ hotline, at which time she was told it might hurt up to “2 or 3, you know, 2 weeks. And after that I should feel better. And, you know, it, it, I guess I was sort of back to normal, but something happened a couple of weeks ago, and it’s just. I can’t like. I was losing. I had limited mobility in my arm. My shoulder. I can’t move it. There was an intense burning pain.”

15. Claimant testified that when she went to Mountain Peaks Urgent Care, the doctor told her that carrying her toddler may have aggravated her shoulder.

16. When Claimant saw Dr. Krebs, she filled out a "Patient Injury History Sheet," and on the line for "date of injury or onset," listed two dates, one being December 29, 2014, and a second incident on March 23, 2015.

17. The ALJ finds, considering the totality of the evidence, that Claimant established by a preponderance of the evidence an initial compensable injury when she slipped and fell on December 29, 2014. However, her symptoms were minor and subsided, and Claimant was essentially symptom-free for almost three months. During that time, she lost no time at work and worked full duty without restrictions. She did not seek any medical treatment because none was necessary, and she reported that her symptoms had resolved.

18. The symptoms Claimant experienced on March 23, 2015, were significantly different and more severe than the initial symptoms she experienced on December 29, 2014. The pain was very intense – 9/10 – and required narcotics to control. Rather than being localized as before, Claimant's pain extended down into her arm. Claimant also reported for the first time that the pain was "burning." Claimant offered no persuasive evidence that the symptoms she experienced on March 23, 2015, were causally related to her job duties or the December 29, 2014 event.

19. Considering the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that the symptoms she began experiencing on approximately March 23, 2015, were related to the incident of December 29, 2014, or were related to her work with Employer.

20. The ALJ finds that the MRI requested by Claimant is not related to a compensable injury, and any further medical treatment related to her left shoulder is denied.

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 in Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of the Respondents. § 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. §8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the claimant's need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). The symptoms Claimant experienced on March 23, 2015, were significantly different and more severe than the initial symptoms she experienced on December 29, 2014. The pain was very intense – 9/10 – and required narcotics to control. Rather than being localized as before, Claimant's pain extended down into her arm. Claimant also reported for the first time that the pain was "burning." Claimant offered no persuasive evidence that the symptoms she experienced on March 23, 2015, were causally related to her job duties or the December 29, 2014 event.

Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997. Claimant failed to establish by a preponderance of the evidence that the symptoms she began experiencing on approximately March 23, 2015, were related to the incident of December 29, 2014, or were related to her work with Employer. Rather, the evidence supports the finding that Claimant's December 29, 2014 injury was so minor it required only limited self-care, and had resolved months before she began experiencing different symptoms in late March, 2015.

Based upon the totality of the evidence the ALJ concludes that Claimant did fall on December 29, 2014 and needed limited medical care which she self-provided. The ALJ concludes any medical care on or after March 23, 2015 is not related to the December 29, 2014 injury and is not related to any other compensable injury.

ORDER

IT IS HEREBY ORDERED:

1. Claimant experienced a compensable injury on December 29, 2014, for which she sought limited or no medical treatment. Any medical treatment sought on or after March 23, 2015, is denied and dismissed, including the MRI recommended by Dr. Krebs.

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

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

DATED: October 14, 2015

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

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STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman St., 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **AARON HOPKINS,** Claimant, vs. **NORTHWEST DISTRIBUTION, INC.,** Employer, and **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-980-185-01**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A Hearing in this matter was held on July 24, 2015, before Administrative Law Judge Michelle E. Jones at the Office of Administrative Courts in Denver, Colorado. Claimant appeared in person and was represented by Bob Ring, Esq. Respondents, Northwest Distribution, Inc. and Travelers Indemnity Company of Connecticut were represented by Jonathan S. Robbins Esq. The hearing was digitally recorded in Courtroom 3 starting at approximately 9:00 a.m.

In this Order, Aaron Hopkins will be referred to as "Claimant," Northwest Distribution, Inc. will be referred to as "Employer," and Travelers Indemnity Company of Connecticut will be referred to as "Insurer." Employer and Insurer will be referred to collectively as "Respondents."

Also in this Order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2015), "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

At hearing, Claimant's Exhibits 1-15 were admitted into evidence as were Respondents' Exhibits A-F. The matter was held open for submission of post hearing position statements which were received by the ALJ on August 18, 2015.

CERTIFICATE OF MAILING OR SERVICE

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

Bob Ring, Esq.
cramirez@ringlegal.com

Jonathan Robbins, Esq.
jsrobbin@travelers.com

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

Date: **10/1/15**

Gabriela Chavez
Court Clerk

#JJYP12L10D1KDOv

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

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